Supreme Court, U.S.
FILED
JAN 24 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

In The Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5146

DAVID RAWLINGS, PETITIONER

v.

COMMONWEALTH OF KENTUCKY, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

PETITION FOR CERTIORARI FILED JULY 30, 1979
CERTIORARI GRANTED DECEMBER 10, 1979

INDEX

	Page
Chronological list of relevant docket entries	1
Transcript of record in Warren Circuit Court:	
Indictment No. 17107	4
Indictment No. 17108	5
Indictment No. 17109	6
Indictment No. 17110	7
Indictment No. 17137	8
Motion to suppress evidence derived from an illegal arrest	9
Motion to suppress evidence due to defective search warrant and illegal arrest	10
Motion to suppress illegally seized evidence	11
Motion to waive trial by jury	12
Order sustaining motion to waive trial by jury	13
Trial order	15
Order scheduling announcement of verdict	17
Order and trial verdict	18
Motion for new trial	24
Judgment	25
Notice of appeal	27
Transcript of suppression hearing held on November 29, 1976 in Warren Circuit Court:	28
Testimony of Mr. Eddie Railey:	
Direct examination by Mr. Caudill	30
Cross-examination by Mr. Thompson	36
Re-direct examination by Mr. Caudill	37
Transcript of suppression hearing held on December 1, 1976 in Warren Circuit Court:	40
Testimony of Mr. David Rawlings:	
Direct examination by Mr. Parry	41
Cross-examination by Mr. Caudill	49
Opinion of Kentucky Court of Appeals, filed February 17, 1978	61
Order of Kentucky Court of Appeals denying petition for rehearing, filed June 9, 1978	68
Dissenting Opinion of Judge Lester, Kentucky Court of Appeals, filed June 9, 1978	69
Order of Kentucky Supreme Court granting discretionary review, filed November 14, 1978	75
Opinion of Kentucky Supreme Court, filed May 1, 1979	76
Mandate of Kentucky Supreme Court, issued May 22, 1979	84
Order of the Supreme Court of the United States granting leave to proceed in forma pauperis and granting petition for writ of certiorari, December 10, 1979	85

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

October 27, 1976–Defendant David Rawlings was indicted in the Warren Circuit Court in Bowling Green, Kentucky on four counts of trafficking in controlled substances classified in Schedules I, II and III (LSD, Benzphetamine, Methamphetamine, and Methyprylon), on or about October 18, 1976.

November 1, 1976–Defendant David Rawlings was indicted in the Warren Circuit Court for the offense of trafficking in a controlled substance classified in Schedule II, Pentobarbital, on or about October 18, 1976.

November 3, 1976–Defendant David Rawlings filed a pretrial motion to suppress all evidence seized in the case because that evidence was derived from an illegal arrest of the defendant.

November 15, 1976–Defendant David Rawlings filed a motion to suppress all evidence confiscated in the case due to the defective search warrant and the illegal arrest of the defendant.

November 18, 1976–Defendant David Rawlings filed a motion to suppress all evidence seized in the case pursuant to a search warrant because the warrant did not specifically name any individual to be searched.

December 2 and 3, 1976–Defendant David Rawlings was tried by judge alone.

February 11, 1977–Contrary to his plea, defendant David Rawlings was convicted in the Warren Circuit Court of one count of trafficking in a controlled substance classified in Schedule I and four counts of possession of controlled substances classified in Schedules II and III; defendant Rawlings was sentenced to five years of imprisonment and a total fine of five thousand dollars ($5,000.00).

February 14, 1977–Defendant David Rawlings filed a motion for a new trial asserting that the searches and seizures in his case were in violation of the United States Constitution.

March 14, 1977–Motion for new trial overruled; final judgment was entered against defendant. Notice of appeal filed in the Warren Circuit Court by defendant.

February 17, 1978–Court of Appeals of Kentucky rendered its opinion in defendant's case and affirmed the conviction.

June 9, 1978–Court of appeals of Kentucky denied the defendant's petition for rehearing.

November 14, 1978–Supreme Court of Kentucky granted defendant's motion for discretionary review of the decision of the Kentucky Court of Appeals.

May 1, 1979–Supreme Court of Kentucky rendered its opinion in defendant's case and affirmed the decision of the Kentucky Court of Appeals.

May 22, 1979–Supreme Court of Kentucky issued mandate in defendant's case.

WARREN CIRCUIT COURT

INDICTMENT NOS. 17107, 17108, 17109, 17110 and 17137

COMMONWEALTH OF KENTUCKY, PLAINTIFF

v.

DAVID RAWLINGS, DEFENDANT

Transcript of Record on Appeal

Warren Circuit Court

October **Term, 197**6

THE COMMONWEALTH OF KENTUCKY
AGAINST
David Rawlings

Indictment

The Grand Jury of the County of Warren in the name and by the authority of the Commonwealth of Kentucky, accuse

David Rawlings

of the crime of Trafficing in a Schedule I Controlled Substance **committed as follows, to-wit: The said** David Rawlings **heretofore, to wit: On or about the** 18 **day of** October **A.D., 19** 76**, and before the finding of this indictment in the County aforesaid, did unlawfully,** / have in his possession for the purpose of sale, a schedule I Controlled Substance, a quantity of LSD, Contrary to KRS No. 218A.990 (2)

[Ind. No. 17107]

Done as aforesaid within the year last past and against the peace and dignity of the Commonwealth of Kentucky.

Morris Lowe

Commonwealth's Attorney, Eighth Judicial District, Kentucky

Warren Circuit Court

OCTOBER **Term, 197**6

THE COMMONWEALTH OF KENTUCKY
AGAINST
David Rawlings

Indictment

The Grand Jury of the County of Warren in the name and by the authority of the Commonwealth of Kentucky, accuse

David Rawlings

of the crime of Trafficing in a Schedule III Controlled Substance **committed as follows, to-wit: The said** David Rawlings **heretofore, to wit: On or about the** 18 **day of** October **A.D., 19** 76**, and before the finding of this indictment in the County aforesaid, did unlawfully,** and knowingly have in his possession, for purpose of sale, a schedule III controlled substance, a quantity of Benzphetamine, Contrary to KRS Number 218A.990 (2)

[Ind. No. 17108]

Done as aforesaid within the year last past and against the peace and dignity of the Commonwealth of Kentucky.

Morris Lowe

Commonwealth's Attorney, Eighth Judicial District, Kentucky

Warren Circuit Court

OCTOBER **Term, 1976**

THE COMMONWEALTH OF KENTUCKY
AGAINST
DAVID RAWLINGS — **Indictment**

The Grand Jury of the County of Warren in the name and by the authority of the Commonwealth of Kentucky, accuse DAVID RAWLINGS

of the crime of TRAFFICING IN A SCHEDULE II CONTROLLED SUBSTANCE **committed as follows, to-wit: The said** DAVID RAWLINGS **heretofore, to wit: On or about the** 18 **day of** OCTOBER **A.D., 19** 76 **, and before the finding of this indictment in the County aforesaid, did unlawfully,** and knowingly have in his possession, for purpose of sale, a schedule II controlled substance, a quantity of Methaamphetamine, Contrary to KRS Number 218A.990 (2)

[Ind. No. 17109]

Done as aforesaid within the year last past and against the peace and dignity of the Commonwealth of Kentucky.

Morris Lowe

Commonwealth's Attorney, Eighth Judicial District, Kentucky

Warren Circuit Court

OCTOBER **Term, 1976**

THE COMMONWEALTH OF KENTUCKY
AGAINST
DAVID RAWLINGS — **Indictment**

The Grand Jury of the County of Warren in the name and by the authority of the Commonwealth of Kentucky, accuse

DAVID RAWLINGS

of the crime of TRAFFICING IN A SCHEDULE III CONTROLLED SUBSTANCE **committed as follows, to-wit: The said** DAVID RAWLINGS **heretofore, to wit: On or about the** 18 **day of** OCTOBER **A.D., 19** 76 **, and before the finding of this indictment in the County aforesaid, did unlawfully,** and knowingly have in his possession, for purpose of sale, a schedule III controlled substance, a quantity of Methyprylan, Contrary to KRS Number 218A.990 (2)

[Ind. No. 17110]

Done as aforesaid within the year last past and against the peace and dignity of the Commonwealth of Kentucky.

Morris Lowe

Commonwealth's Attorney, Eighth Judicial District, Kentucky

Warren Circuit Court

NOVEMBER **Term, 19**76

THE COMMONWEALTH OF KENTUCKY
AGAINST
DAVID RAWLINGS

Indictment

The Grand Jury of the County of Warren in the name and by the authority of the Commonwealth of Kentucky, accuse

DAVID RAWLINGS

of the crime of TRAFFICING IN A SCHEDULE II CONTROLLED SUBSTANCE

committed as follows, to-wit: The said DAVID RAWLINGS **heretofore, to wit: On or about the** 18 **day of** OCTOBER **A.D., 19**76 **, and before the finding of this indictment in the County aforesaid, did unlawfully,** and knowingly have in his possession, for purpose of sale, a schedule II controlled substance, a quantity of Pentobarbital, Contrary to KRS Number 218A.990 (2)

[Ind. No. 17137]

Done as aforesaid within the year last past and against the peace and dignity of the Commonwealth of Kentucky.

Morris Lowe

Commonwealth's Attorney, Eighth Judicial District, Kentucky

WARREN CIRCUIT COURT
DIVISION II

Indictment Nos. 17107-a
17107-b through 17110

COMMONWEALTH OF KENTUCKY
Plaintiff

vs.

DAVID RAWLINGS
Defendant

MOTION TO SUPPRESS

Comes the Defendant, David Rawlings, and moves the Court to suppress all evidence seized in this action because said evidence was derived from an illegal arrest of the Defendant without probable cause by the arresting officers.

WHEREFORE, the Defendant prays the Court to grant said Motion.

Kelly Thompson, Jr.
Attorney for Defendant

CERTIFICATE:

This is to certify that a true copy of the foregoing was this day served upon the Honorable Morris Lowe, Commonwealth Attorney.

Kelly Thompson, Jr.

NOTICE:

Foregoing Motion will be brought on for hearing by the Court on November 10, 1976, at the Pretrial Conference of this styled action.

Kelly Thompson, Jr.

WARREN CIRCUIT COURT
DIVISION II

Indictment Nos. 17107 17107-A,
17108, 17109, and 17110

COMMONWEALTH OF KENTUCKY

Plaintiff

vs.

DAVID RAWLINGS

Defendant

MOTION TO SUPPRESS

Comes the Defendant, David Rawlings, by Counsel and moves the Court to suppress the evidence confiscated in the above action in that the Warrant for said search was defective as to the Defendant, David Rawlings; and also, in that the search of the Defendant was conducted after an illegal arrest of the Defendant.

WHEREFORE, the Defendant prays the Court to grant the above Motion.

Kelly Thompson, Jr.
Attorney for Defendant

CERTIFICATE:

This is to certify a true copy of the foregoing was this day day served upon the Hon. Morris Lowe. This_____day of November, 1976.

Kelly Thompson, Jr.
Attorney for Defendant

NOTICE:

The foregoing Motion will be brought on for hearing before the Trial of this action on November 23, 1976, at the hour of 9:00 A.M.

Kelly Thompson, Jr.

WARREN CIRCUIT COURT
Division II

Indictment Nos. 17107, 17108,
17109, 17110, and 17137

COMMONWEALTH OF KENTUCKY

Plaintiff

vs.

DAVID RAWLINGS

Defendant

MOTION TO SUPPRESS ILLEGALLY SEIZED EVIDENCE

Comes the Defendant, David Rawlings, by counsel, and moves the Court to suppress all evidence seized in this action pursuant to a Search Warrant issued by County Judge, Basil Griffin, in that said Search Warrant does not specifically name any individual to be searched.

In support of this Motion, Defendant sites the United States of America V. Festa, 192 F. SUPP 160 (1960); United Strates V. DiRE, 332 U.S. 581; Marron V. United States, 275, U.S. 192; United States V. Haywood, 284 F. SUPP 245 (1968).

WHEREFORE, the Defendant prays the Court to grant the above Motion.

Kelly Thompson, Jr.

CERTIFICATE:

This is to certify that a true copy of the foregoing was this day served upon the Honorable Morris Lowe, Commonwealth Attorney.

Kelly Thompson, Jr.

NOTICE:

The foregoing Motion will be brought on for hearing before the Court at 3:45 P.M. on November 22, 1976.

Kelly Thompson, Jr.

WARREN CIRCUIT COURT
DIVISION II

Indictment Nos. 17107-A
17107-B, through 17110

COMMONWEALTH OF KENTUCKY
Plaintiff

vs.

DAVID RAWLINGS
Defendant

MOTION TO WAIVE TRIAL BY JURY

Comes the Defendant, David Rawlings, and moves the Court to allow the Defendant to waive his right to a trial by Jury so as to conduct a trial of this case solely before the Honorable Judge J. David Francis.

Wherefore, the Defendant prays the Court to grant the above Motion.

Kelly Thompson, Jr.
Attorney for Defendant

CERTIFICATE:

This is to certify that a true copy of the foregoing was this day served upon the Honorable Morris Lowe, Commonwealth Attorney.

Kelly Thompson, Jr.

NOTICE:

The foregoing Motion will be brought on for hearing on Monday, November 29, 1976, at the hour of 2:00 p.m.

Kelly Thompson, Jr.

WARREN CIRCUIT COURT
Division No. II

Indictment Nos. 17107, 17108
17109, 17110, 17137

COMMONWEALTH OF KENTUCKY
Plaintiff

vs.

DAVID RAWLINGS
Defendant

ORDER SUSTAINING DEFENDANT, DAVID RAWLINGS' MOTION THAT HE BE ALLOWED TO WAIVE A JURY TRIAL AND BE TRIED BY THE COURT

Prior to the beginning of the above styled case, the Court took notice of the fact that the Defendant had filed a written Motion Waiving Jury Trial and allowing him to be tried solely by the Court. The Court, with the Defendant Rawlings present, with his attorneys, first OVERRULED the Motion as the Court felt that the Defendant may not fully understand the matter sufficiently to intelligently make such a waiver, and thereupon a Suppression Hearing was held, at which time the Defendant and his counsel, the Honorable Ron Parry and the Honorable Kelly Thompson, were present and the Defendant's father was also present, and at the conclusion of this Hearing, the Defendant, with his counsel, left. Shortly thereafter the Defendant reentered this Court's chambers and announced that he wanted to talk with the Judge. The Court looked up from his desk and informed the Defendant that he could not talk without his attorney being present, but then noted that his attorneys, Parry and Thompson, were right behind him, and that the Defendant then, in his own words, said "Judge, I want to be tried without a Jury".

The Court then took into consideration the case of Short v. Commonwealth, 519 SW2d, 828, and again questioned the Defendant carefully and determined that the Defendant was twenty-one (21) years of age, was a high school graduate, and had formerly been enrolled, but not

graduated from, Western Kentucky University, that he was intelligent and articulate, and had the advice of two employed attorneys who appeared knowledgeable and capable in advising this Defendant, and the Defendant's father was also present, and that it further appeared to the Court that this was the Defendant's decision and that it had a sound basis in law and fact.

NOW THEREFORE IT IS ORDERED, DIRECTED, AND ADJUDGED, that the Defendant be, and he is hereby, allowed to be tried before the Court without a Jury.

This the 1st day of December, 1976.

JUDGE, WARREN CIRCUIT
COURT DIVISION II

WARREN CIRCUIT COURT
Division II

Indictment Nos. 17107,
17108, 17109, 17110, 17137

COMMONWEALTH OF KENTUCKY

Plaintiff

vs.

DAVID RAWLINGS

Defendant

TRIAL ORDER

The defendant being present and represented by attorney's Ron Perry, and Kelly Thompson. The Commonwealth being represented by Mike Caudill, Asst. Commonwealth Attorney. A motion having been made that this defendant be tried by the Court without a jury, and after extension examination of the defendant by the Judge, in the presence of the defendant's father, it was ordered that the Court would try this case without the jury, as the defendant having stated that this was his desire. The defendant waived the reading the the indictments, but the Judge inquired of him as to his plea in each case, to which he entered Not Guilty to each indictment. The Commonwealth Attorney announced that he would let the indictments stand as his opening statement, and the defense reserved opening statements. The Commonwealth proceeded to call their witnesses.

The lunch hour approaching, Court recessed at 11:40 A.M. and all parties were requested to return at 2:00 P.M. Again Commonwealth witnesses were heard continuously except for a short recess at 3:20 P.M. until 6:00 P.M. at which time Court adjourned until 9:30 the following morning December 3, 1976.

On Friday morning, December 3, 1976, Court resumed, with the further testimony of Commonwealth witnesses. The Commonwealth closed their case in chief at 10:50 A.M. At this time the defense witness were then called. They announced their case closed at 11:12 A.M. Rebuttal testimony was started by the Commonwealth. During the tes-

timony of Eddie Raily, a question arose that the defense had not been able to have the substances in question analyzed. At this time Morris Lowe, Commonwealth Attorney, had a motion that the case be continued so that the defense could have the substances examined by a chemist of their choosing, who was duly certified and qualified by the Federal Drug Administration. The Judge took this under advisement and adjourned until 1:00.

At 1:00 P.M. Court again resumed, the Judge announced that he had considered the motion and would Sustain same. Mr. Lowe then made a motion that the money held as evidence in this case be returned to the defendant, said motion Sustained. Arguments for both the Commonwealth and defense were heard by the Judge, and he recessed until 4:00 P.M.

When Court resumed at 4:00 P.M. further arguments, were heard and citiations were presented to the Court. The Court then ruled, that each attorney would be allowed to file a brief, these briefs' were to be filed simultaneous by Monday January 10, 1978. It is Ordered that this case be passed until January 10, 1976.

This———day of ———, 1976.

JUDGE, WARREN CIRCUIT COURT
DIV. II. JDF

WARREN CIRCUIT COURT
Division II

Indictment Nos. 17107, 17108,
17109, 17110, and 17137

COMMONWEALTH OF KENTUCKY

Plantiff

vs.

DAVID RAWLINGS

Defendant

ORDER

The Court having heard the testimony and proof in the above-styled action, and having considered same;

IT IS HEREBY ORDERED that the Defendant, Defendant's Counsel, and the Commonwealth Attorney be present in the Warren Circuit Courtroom at 11:00 a.m. Friday February 11th, 1977, at which time a decision will be handed down in this case.

This 9th day of February, 1977.

J. David Francis, Judge
Division Two
Warren Circuit Court

WARREN CIRCUIT COURT
Division II

Indictment Nos. 17107, 17108,
17109, 17110, 17137

COMMONWEALTH OF KENTUCKY

Plaintiff

vs.

DAVID RAWLINGS

Defendant

ORDER

In the above styled Indictments the Defendant, David Rawlings, in each Indictment is charged with the offense of knowingly having in his possession for purpose of sale the following listed substances:

Ind. No. 17107	Lysergic Acid Diethylamide	Schedule I
Ind. No. 17108	Benzphetamine	Schedule III
Ind. No. 17109	Methamphetamine	Schedule II
Ind. No. 17110	Methyprylon	Schedule III
Ind. No. 17137	Penobarbital	Schedule II
Ind. No. 17107-A	Phentabarbital	Schedule II
Ind. No. 17107-B	Amphetamines	Schedule II

The following of the above have at some stage of the proceedings been dismissed.

Ind. No. 17107-A	Phentabarbital	Schedule II
Ind. No. 17107-B	Amphetamines	Schedule II

The Defendant had filed a written Motion for this case to be heard before the Court without the intervention of a Jury and this motion was OVERRULED. On Monday, November 29, 1976, a Suppression Hearing was held and the Court Ordered that the items which were the subject of the search and seizure were admissible into evidence and that the case would go to trial as scheduled on the following day.

The Motion to be heard by the Court without a Jury was again made and the Court then entered an Order permitting the Defendant to be tried by the Court without a Jury and a written Order stating the reasons for the Court's

ruling has heretofore been entered and the case went to trial before the Court.

The Court gave the defense a continuing objection to all matters related to the introduction of the controlled substances and the facts as found by the Court relative to their introduction and the content of the Suppression Hearing is as follows:

Officer Eddie Railey, of the Kentucky State Police, Drug Section, and several other officers, among them Detective Glen Wood, of the Commonwealth Attorney's office, Detective Bevins of the Kentucky State Police, and about three more in the process of serving bench warrants and making numerous arrests on sealed Indictments on what might be called a "drug roundup", went to the residence of Marty Marquess at 1264 Adams Street, Bowling Green, Warren County, Kentucky, for the purpose of serving a bench warrant on Marquess for his arrest for the sale of Lysergic Acid Diethylamide; the sale having been made to undercover agents in this house and that going through the house they had seen a gun in Marquess' room but without knowing whether or not it was loaded and without having access to it.

On arriving there they were told that Mr. Marquess was not present. They entered the residence to look for Marquess themselves and found that those present were Dennis Sadler, who lived at the residence; Vanessa Cox; the Defendant, David Rawlings; Keith Northern; and Brenda Braden. The last two above named apparently had just arrived ahead of the officers. The officers went through the house looking for Marquess and in the process of doing so, noted a strong smell of marijuana smoke and in Marquess' room saw mariguana seeds lying on a mantel piece or some kind of a ledge or shelf. The officers determined to get a search warrant to search the house and Officer Railey and another officer left to go to the Courthouse to get a search warrant from the County Judge, the Honorable Basil Griffin. The other officers were left in charge and the persons above named in the residence were ordered to remain there pending the return of Officer Railey with the search warrant. The witnesses gave different times for how long it took for Officer Railey to get the search warrants, and these times ranged from 30 minutes to an hour. It is only about a six block drive from the site of this house to the County Courthouse and Officer Railey testified that upon entering the Courthouse he saw Morris Lowe, Common-

wealth's Attorney, and told him what happened and Mr. Lowe accompanied him to the County Judge's office where the County Judge saw them without delay. The search warrant was completed and they returned immediately to 1264 Adams Street.

The Court finds as a matter of fact and a matter of law that restraining the five (5) persons was not unreasonable or unlawful. The Court finds that the search warrants as issued as a matter of fact and as a matter of law is proper and adequate to legally authorize the officers to search the residence.

Northern and Braden, in the absence of Officer Railey, had voluntarily submitted to a search and had been permitted to leave.

Before starting search of the house, the officers told Vanessa Cox, Rawlings and Sadler, that they would search them before beginning the search of the building. Vanessa Cox was told to dump the contents of her purse on a table and in obedience to the order, dumped out the contents of her purse, including the items mentioned in the five indictments. She told the officers that they belonged to Rawlings and he acknowledged that they did and removed from the contents of Vanessa Cox's purse the things that belonged to him, including these controlled substances. Vanessa Cox did not object to the search then and does not object now.

The problem before the Court on the Motion to Suppress is to determine whether or not the exigencies of the circumstances as stated permitted the officers to search the parties before beginning a search of the residence for which they had a search warrant or would a search of the persons without a search warrant for their search be in violation of the 4th Amendment to the Constitution.

The Court finds that the officers were in a place where they had a right to be and that they had a right and legal authority to search the house pursuant to the search warrant, and that the exigencies of these circumstances in that knowing that this residence had been used for the sale of Lysergic Acid Diethylamide in the past and that there was a gun in the house; that their search of the premises had to do with the presence of contraband, the possession of which constituted a crime and that therefore a perfunctory search of the persons, including the contents of Mrs. Cox's purse, was permitted under the 4th Amendment to the Constitution and, as a matter of fact and common sense was a required procedure.

In the search of David Rawlings, the officer noticed a bulge in an inside breast pocket of his leather jacket, patted the outside, then reached inside the coat and pulled out a sum of money composed on one hundred sixty-one (161) bills bound together with rubber bonds which makes a packet approximately ¾ inch in thickness, which sum totaled Four Thousand Five Hundred ($4,500) Dollars.

The Court finds as a matter of fact and as a matter of law that the search of Rawlings was permissible under the exigencies of the situation presented and that the money was admissible into evidence.

Among other things found on the person of Rawlings was a knife that folded and was in a sheath fastened to his belt. It appears from the witnesses in the trial, but not in the Suppression Hearing, that this knife had been taken from Rawlings when he boarded an airplane to come to Bowling Green and that it was returned to him at the airport. One witness testified that the knife was 5½ to 6 inches in length and, when open, was approximately 10½ inches long. However, this was not offered in evidence as apparently this knife was taken over to the jail and, on Rawlings release pending trial, was returned to him. The knife or its place in evidence is not an issue in this case.

The Defendant introduced evidence at the Suppression Hearing to show ownership of the controlled substances for the purpose of showing standing to object to the search of Mrs. Cox's purse and the introduction of the contents of same as evidence. The Court having determined that the search of both Mrs. Cox and Mr. Rawlings was permissible and legal, the matter of standing is of no significance in this matter. However, the Court will address the matter of "Standing".

The Court finds it unbelievable that just of his own volition, David Rawlings put the contraband in the purse of Mrs. Cox just a minute before the officers knocked on the door. He had been carrying these things around Bowling Green in a bank deposit sack for days, either on his person or in his pocket, and it is unworthy of belief that just immediately before the officers knocked on the door that he put them in the purse of Vanessa Cox. It is far more plausible to believe that he saw the officers pull up out front and then elected to "push them off" on Vanessa Cox, believing that search was probable, possible, and emminent. But, even taking his word for this, items being placed in her purse simply for his convenience and which she did not ob-

ject to the search and does not object now, this Court finds that Rawlings is without standing, having established ownership to object to the search of the purse of Mrs. Cox.

The Court fully understands that the statements made by Rawlings at the Suprression Hearing as to ownership may not be considered by the Court sitting without a Jury in determining the guilt or innocence of David Rawlings in these cases.

The Court has considered the testimony of Vanessa Cox, who testified that she had seen the bottle containing the LSD and that Rawlings had offered to sell some to her; also that Rawlings had placed it in her purse. The testimony of Stallons, who testified that he had "seen the acid"; that Rawlings had offered to sell some to him; the testimony of Dennis Sadler, who had purchased one hundred of the tablets for One Hundred Sixty-five ($165) Dollars; this sale having taken place at the home of a man called Mark, who lives on the Nashville Road; and the testimony of Marty Marquess that Rawlings displayed a few of the pills to him, not a large quantity, and offered to sell him some for One Hundred Six-five ($165) Dollars; and after the items were dumped on the table at the search, Rawlings admitted to the officers that the items were his; and a witness from the Drug Laboratory of the Kentucky State Police identified all of the controlled substances as being, or containing, the contraband for which the Defendant Rawlings is charged. Under this proof, the Court finds the Defendant GUILTY as charged for possession of Lysergic Acid Diethylamide for the purpose of sale, and fixes his punishment at five (5) years in the penitentiary for trafficing in Lysergic Acid Diethylamide, and a fine of Three Thousand ($3,000) Dollars. KRS 218A. 990(2)

On the other Indictments there is no evidence that he offered to make any sales to anyone of these items and about the only person who had seen the other items, and she without knowing what they were, was Vanessa Cox, when they were placed in her purse.

THEREFORE, on Indictments Nos. 17108, 17109, 17110, and 17137, the Defendant, David Rawlings, is found GUILTY on the charge of possession of the items mentioned in the Indictments contrary to the Statutes provided, and his punishment is fixed as follows:

17108—Possesion of a Schedule III Controlled Substance, to-wit: Benzphetamine, and fixes his punishment at one (1) year in the County Jail and a fine of Five Hundred ($500) Dollars.
KRS 218A.990(6)

17109—Possession of a Schedule II Controlled Substance, to-wit: Methamphetamine, and fixes his punishment at one (1) year in the County Jail and a fine of Five Hundred ($500) Dollars.
KRS 218A.990(6)

17110—Possession of a Schedule III Controlled Substance, to-wit: Methyprylon, and fixes his punishment at one (1) year in the County Jail and a fine of Five Hundred ($500) Dollars.
KRS 218A.990 (6)

17137—Possession of a Schedule II Controlled Substance, to-wit: Penobarbital, and fixes his punishment at one (1) year in the County Jail, and a fine of Five Hundred ($500) Dollars.
KRS 218A.990 (6)

At the close of all the proof the Defendant made a Motion to Dismiss the Indictment No. 17107 of Lysergic Acid Diethylamide, on the charge that the Statute does not mention a drug "LSD", which is the term used in the Indictment. The purpose of a pleading, including an Indictment, is to advise the adverse party of the nature of the claim against him, or in the case of an Indictment, the criminal for which he is being charged.

The Term "LSD" is so familiar and its common meaning is Lysergic Acid Diethylamide. The Defendant knows and used this term; Defendant's counsel knows and used this; and certainly the Commonwealth's Attorney knows and used this, and the Lab man who tested the substance testified that the substance was Lysergic Acid Diethylamide.

THEREFORE, this Motion is OVERRULED.

This———day of February, 1977.

JUDGE, WARREN CIRCUIT
COURT DIVISION II

WARREN CIRCUIT COURT
Division II

Indictment No. 17107, 17108,
17109, 17110, and 17137

COMMONWEALTH OF KENTUCKY

Plaintiff

vs.

DAVID RAWLINGS

Defendant

MOTION FOR NEW TRIAL

Comes the Defendant, David Rawlings, by counsel, and moves the Court for a new trial for the following reasons:

1) The seizure of the Defendant, David Rawlings, and of Vanessa Cox while Eddie Railey procured a search warrant was unreasonable and in violation of the Constitution of the United States.

2) The search warrants issued in this case did not authorize the search of Vanessa Cox or David Rawlings.

3) The search of Vanessa Cox's purse was not pursuant to a consent of Vanessa Cox, but by order of her captors.

FOR ALL OF THE FOREGOING REASONS, the Defendant respectfully prays:

1) That the Judgment should be arrested.

2) That the verdict should be set aside, and the Defendant ordered acquitted.

3) That in the alternative, a new trial should be ordered.

Dated this 14th day of February, 1977.

Kelly Thompson, Jr.
Counsel for Defendant,
David Rawlings

CERTIFICATE:

This is to certify a true copy of the foregoing was this day served upon the Honorable Morris Lowe, Commonwealth Attorney and Honorable Ron Parry, Co-Counsel for the Defendant.
Kelly Thompson Jr.

WARREN CIRCUIT COURT
Division II

Indictment No. 17107, 17108
17109, 17110, 17137

COMMONWEALTH OF KENTUCKY

Plaintiff

vs.

DAVID RAWLINGS

Defendant

JUDGMENT

The defendant being present in open court with his attorney(s), KELLY THOMPSON, JR; it appearing from the record that a Motion and Grounds for a New Trial was timely made and filed and is now pending, the Court having heard argument on the Motion and Grounds, and the Court being sufficiently advised, IT IS HEREBY ORDERED that said motion be OVERRULED.

Attorney(s) for the defendant having then made a Motion for Probation, and the Court being sufficiently advised;

IT IS HEREBY ORDERED that said Motion for Probation is OVERRULED.

The defendant having been then asked if he has legal cause to show why judgment should not be pronounced against him and upon advice of counsel, none being shown, IT IS ADJUDGED that the defendant be taken by the Sheriff of Warren County to the Jail of Warren County and from there by the Sheriff of said county transferred to the Department of Corrections and to remain in custody for a period of *5 years and $3,000 fine on #17107, 1 year in county jail* and $500 fine on #17108. 1 year in county jail and $500 fine on #17109, *1 year and $500 fine on #17110, and 1 year in county jail and $500 fine* on #17137 (The 4 year total in county jail is to run concurrently with the 5 year penitentiary sentence.), and the Sheriff of said County shall transfer the defendant to the custody of the Department of Corrections at such location as the Department shall designate.

The defendant having then moved the Court to set a bond for appeal;

( ) IT IS ORDERED that appeal bond be set at $5,000 Cash bond.

( ) IT IS ORDERED that said Motion be OVERRULED.

Entered this 11 day of MARCH, 1977.

JUDGE, WARREN CIRCUIT COURT DIVISION II

The defendant is to be credited with 32 days jail time.

WARREN CIRCUIT COURT
Division II

Indictment Nos. 17107, 17108, 17109, 17110, and 17137

COMMONWEALTH OF KENTUCKY

Plaintiff

vs.

DAVID RAWLINGS

Defendant

NOTICE OF APPEAL

Comes the Defendant, David Rawlings, by Counsel, and gives notice that appeals from the verdict rendered by the Warren Circuit Court, Division No. II, on February 11, 1977, and from the Order overruling the Defendant's Motion for a New Trial entered by the Warren Circuit Court on March 11, 1977.

Kelly Thompson, Jr.
Attorney for Defendant

WARREN CIRCUIT COURT

Indictment Nos. 17107, 17108,
17109, 17110 and 17137

COMMONWEALTH OF KENTUCKY,

Plantiff

vs.

DAVID RAWLINGS,

Defendant

Suppression Hearing
Transcript date: November 29, 1976

WARREN CIRCUIT COURT
Division II

COMMONWEALTH OF KENTUCKY

Plaintiff

vs.

DAVID RAWLINGS

Defendant

SUPPRESSION HEARING

On Friday, November 29, 1976, a hearing was held before the Honorable J. David Francis, Judge, Warren Circuit Court Division II, in the above-styled case at 2:00 P.M.

Appearing on behalf of the Commonwealth was the Assistant Commonwealth Attorney, Hon. Michael Caudill. Appearing on behalf of the Defendant was Hon. Kelly Thompson, Jr., 410 East 11th St., Bowling Green, Kentucky.

THE PROCEEDINGS WERE AS FOLLOWS:

MR. THOMPSON: Your Honor, it's our contention that the search warrant which was used to search the person of the defendant and of another person—I believe Officer Railey's here to testify, but I think we might be able to reach a stipulation.

THE COURT: You're questioning the search warrant?

MR. THOMPSON: Yes sir.

THE COURT: Now, this has to do with five indictments.

MR. THOMPSON: Your Honor, in this case, this search warrant was procured for the premises of—

THE COURT: Let me just read it. This has to do with Lawrence Marquess. He lived in the house?

MR. THOMPSON: Yes Judge.

THE COURT: And the warrant is to search the premises at 1264 Adams Street. All right, now, make your argument.

MR. THOMPSON: Your Honor, it's the contention of the defense that a search warrant authorizing the officer to search a certain premise—

THE COURT: House

MR. THOMPSON: House, is not an authorized search of the people present in that house such as if you gave me a warrant to search—

THE COURT: Give me a case.

MR. THOMPSON: Right here, Your Honor. This goes back, Your Honor, to the Constitution where it says that a search warrant particularly describes the persons and places to be searched, and there's two more old cases. It goes back—those are the old ones. I'll show them to you for general knowledge. Those are the two cases cited continually on this issue.

THE COURT: Did you see this?

MR. CAUDILL: Yes sir.

THE COURT: All right, gentlemen.

MR. CAUDILL: Your Honor, I would like to put Mr. Railey under oath so I may qualify this thing.

EDDIE RAILEY, having been first duly sworn on oath, testified as follows:

DIRECT EXAMINATION BY: MR. CAUDILL

Q1 State your name and occupation.

A Eddie Railey, Narcotics Agent, Kentucky State Police.

Q2 All right, Officer Railey, on October the 18th, 1976, did you have in your possession an arrest warrant for one Lawrence Marquess?

A Yes sir, I did.

THE COURT: Arrest warrant?

MR. CAUDILL: Arrest warrant, yes sir.

Q3 And for what offense was Lawrence Marquess charged with on that date?

A Trafficing in LSD.

Q4 All right, and what—would you tell the Court about the offense that Lawrence Marquess was charged with?

A Well, I wasn't a witness to the offense, but he sold a quantity of LSD to an undercover agent, State Police Officer, by the name of John Bruce at a date before this time at this house on 1264 Adams Street in Bowling Green.

Q5 And this is the same house that you went to at a date with the arrest warrant; is that correct?

A Yes sir.

Q6 Now, who was the—with you when you went to execute the arrest warrant?

A Detective John Bruce, Detective Terry Barnes, Vincent Noble, Don Bivens, and—

Q7 Just to the best of your memory.

A All right. There was two or three others that came in.

Q8 Who entered the house first when you were armed with the arrest warrant?

A I did.

Q9 And upon entering the house, what did you observe?

A As soon as I entered the house, I entered into like a foyer, and I smelled marijuana in the house, and I could see people off to the right. I went in the direction of the people and asked if Mr. Marquess was present, and they said, 'no, he wasn't.'

Q10 And what did you do upon them telling you that he was not present?

A I continued to go ahead and look through the house, walked back to the kitchen in a circle, and came back through all the rooms of the house looking for Mr. Marquess to make sure he wasn't hiding in the house.

Q11 How many people were in the house when you arrived excluding the officers that were involved in the arrest?

A Five.

Q12 And who were these people?

A One was Dennis Sadler, the other Vanessa Cox, David Rawlings, and the other two; I don't have their names written down.

Q13 I believe Keith Northern and Linda Braden.

A That's correct.

Q14 All right. Where in the house did you smell marijuana smoke?

A When I first entered the house I smelled it and smelled it on into the living room, and Mr. Sadler's bedroom was kind of between the living room and the entrance, and I could smell it all in that area.

Q15 Did you see any marijuana or seeds in the house?

A As I came back through one of the bedrooms, I noticed what looked like some seeds laying on a mantle in one of the bedrooms.

Q16 Now, Detective Railey, at this point, what did you do when you smelled the marijuana and saw the seeds?

A I advised some of the other officers that were there to stay there while I came to the courthouse and obtained a search warrant.

Q17 And what did you obtain a search warrant for?

THE COURT: Wait a minute. Is the search warrant I have just looked at and examined, is that the search warrant you obtained?

MR. RAILEY: Yes sir.

MR. CAUDILL:

Q18 Now, after you got the search warrant and returned

to the house, how much time are we talking about from the time you left the house until the time you got back?

A Approximately 30 minutes.

Q19 When you got back at the house, what is the first thing you did?

A As soon as I walked into the living room area where most of the people were at, I think maybe Mr. Sadler had stepped into a bedroom, I asked that everyone come into the living room.

Q20 What was your purpose for doing that?

A To have the people in one place, and I wouldn't have to repeat it twice. I read the warrant, search warrant, to all the people that were there. Another female was in the house that wasn't there whenever we first went in. She was there at that time, and—

Q21 Now, I'll ask you this. After you read the search warrant, where was Vanessa Cox sitting in that room?

A She was sitting on the couch next to David Rawlings.

Q22 And where was the purse that these drugs were found in? Where was it located?

A On the couch.

Q23 Now, did you search any of the house before you patted down any of the people that were in the house?

A No sir, I did not.

Q24 Did you conduct a pat-down search of the persons that were in the house?

A Yes sir, I did.

Q25 Did you believe that your safety or the safety of anybody else in the house might have been endangered at that point?

A Well, I felt like after I advised these people that we had a search warrant and advised them of their rights that some of them might have fear of being arrested, and I felt like I might need to search those persons.

Q26 Why did you think that you might be endangered at this point?

A Well, I always search everyone that I arrest or prior to their arrest if I think they might be dangerous to myself or other officers.

Q27 Was this purse within reach of both Vanessa Cox and the Rawlings defendant?

A Yes sir, it was.

Q28 All right, and was the search for weapons prior to this?

THE COURT: Excuse me, would you ask the officer to describe the purse a little better?

MR. RAILEY:

A It was just a leather purse.

MR. CAUDILL:

Q29 How big was the purse?

THE COURT: Just a regular ladies purse?

A Yes sir, a ladies purse, leather purse. Oh, it's probably no bigger than—it's not quite as big as this notebook tablet.

THE COURT: Let the record show that he's demonstrating a regular ten by twelve looseleaf notebook.

MR. RAILEY: It was probably smaller than that.

MR. CAUDILL:

Q30 Was it large enough to where a small caliber pistol could have been hidden?

A Yes sir, it was.

Q31 Did you reasonably believe that there could have been a pistol in this purse or on any of the subjects in the house?

A Well, I didn't know whether it was or wasn't. I patted these people down to make sure there wasn't any.

Q32 Was that your specific purpose for patting them down?

A Yes sir.

Q33 Now, if you would, tell us what was found in the purse?

A In the purse was a large quantity of LSD, benzphetamine, hashish, methamphetamine, and phentabarbital, I believe it was.

Q34 How much LSD was in the purse?

MR. THOMPSON: We'll stipulate there was drugs in the purse.

MR. CAUDILL:

Q35 How much LSD was in the purse?

A Approximately 1800 tablets.

Q36 In your experience as an officer, is this an unusually large amount of LSD?

MR. THOMPSON: Does this have to do with suppression?

MR. RAILEY:

A This is the largest amount of LSD that I've ever seen at one place at any given time.

Q37 Did it give you cause for alarm to protect such amount of drugs?

A Yes sir, it did. This would be worth several thousand dollars.

Q38 Approximately how many thousand?

A Six or eight thousand on the street.

Q39 All right, sir, now what—how did Vanessa Cox react when you first found this in her purse? What did she do?

A She acted startled, of course, and we asked her if these things belonged to her, and she looked at Mr. Rawlings as if she didn't know what to say to us.

Q40 Did she look at anybody else in the room?

A She looked at me.

Q41 And Mr. Rawlings?

A Right.

Q42 At this time did you conduct a pat down search of Mr. Rawlings?

A Yes sir.

Q43 And what was your purpose for searching him?

A For weapons or anything else that he might have that would be illegal.

Q44 Now, Officer Railey, when you patted down Mr. Rawlings, what is the first thing you came upon?

A Well, the very first thing I noticed, I reached up here to pat his chest, and I felt a large bulk in his coat, and I reached under his coat, and as soon as I got ahold of what this was, I could, you know, I thought it was money, and I pulled it out, and it was $4,500 in cash in his coat pocket, and that was the only, you know—there wasn't any weapons or drugs on Mr. Rawlings.

Q45 Now, these searches of Vanessa Cox's purse and Rawlings person, they were searched for the purpose of finding out if there were weapons upon them.

A Yes sir.

Q46 You had previously been to this house before when you went in with the arrest warrant?

A Yes sir.

Q47 Why at that time did you not search for weapons?

A Well, I didn't think that anybody there had any alarm to cause us any danger. I didn't think they were alarmed, they weren't fearful of being arrested at that particular time.

Q48 But as you stood there with a search warrant, did you believe this gave them cause to be alarmed?

A I most certainly did.

Q49 And is this why you made this protective search?

A Yes sir. Every person in the house was searched.

Q50 Were they all searched before you searched the house?

A Yes sir.

Q51 Tell the Court what else was found in the house.

A Well, I don't have everything written down here in front of me exactly.

MR. THOMPSON: That's not the subject of this hearing.

MR. RAILEY:

A Cocaine, some other quantities of LSD in the rooms. We found methaprylan, amphetamines, marijuana scales, I found some marijuana on one of the persons that was arrested in the house; Mr. Sadler. I found a marijuana pipe and marijuana in his rear pocket and several other items.

Q52 Now, Detective Railey, before you conducted the pat down search and the search of the house, did you advise everybody in the house of their rights?

A Yes sir. Everybody was advised of their rights.

Q53 After finding the drugs in the purse and the money on Mr. Rawlings, were any statements made by either Vanessa Cox or Mr. Rawlings?

A Yes sir. I asked—after I saw this money and all the drugs in her purse, it hit me that, you know, she was indicating that these drugs belonged to Mr. Rawlings, and with him having this large sum of money, it appeared to me that possibly what she was saying was true that he had put these things in her purse. And she gave us a written statement in the house that Mr. Rawlings had put these things in her purse prior to us arriving there. And Mr. Rawlings stated to me two or three times that he did put it in there, but he didn't want to give any written statements. And then I think about the last time I asked him if he would give me a written statement as to putting this stuff in her purse, he said, 'would it help her? Would it keep her from getting in trouble?' And I said, 'I don't know.'

THE COURT: Is she indicted?

MR. CAUDILL: No, sir, she's indicted under sealed indictments, but she'll not be tried at this time.

MR. RAILEY:

A And he indicated to me two or three times that—

THE COURT: Is she going to testify?

MR. CAUDILL: Yes sir.

MR. RAILEY:

A He indicated that these drugs belonged to him but he wouldn't give me any written statements or anything until he saw his attorney.

MR. CAUDILL. On the basis of Detective Railey's testimony, I would argue to the Court that Mr. Thompson's cases are not applicable to the case of the bar.

THE COURT: He might like to cross examine.

CROSS EXAMINATION BY: MR. THOMPSON

Q1 Mr. Railey, you remember a preliminary hearing in the County Court in this case?

A Yes sir.

Q2 Do you remember me asking you if you were in fear of your life at that time?

THE COURT: Excuse me, was there a preliminary hearing held in whose Court?

MR. THOMPSON: Judge Griffin's Court, Your Honor.

Q3 Do you remember me asking you if you were ever in fear of your life?

A I don't remember whether you asked me that or not.

Q4 And do you remember your answer?

A Evidently I don't because I don't remember.

Q5 Mr. Caudill was present fortunately for us. Mr. Railey, how come none of this was mentioned?

A I wasn't in fear of my life. If I had been, I would've had my guns drawn, but I had a certain amount of caution.

MR. CAUDILL: He said he was concerned for his safety.

MR. RAILEY:

A I wasn't thinking I was going to be killed right at that instant, but I was concerned with my safety.

MR. THOMPSON:

Q6 Could you explain why none of this justification was brought up at that preliminary hearing?

A I answered the questions that I was specifically asked.

Q7 Let's get this straight. You came into the residence and found the people.

A Correct.

Q8 And you told them to wait there until you got back with a warrant; is that correct?

A I didn't tell them anything.

Q9 Did they try to leave?

A No, they didn't. I told the officers that were there to stay while Det. Bruce and I came to the courthouse and obtained a search warrant. Apparently, if they were asked, apparently the other officers told them they had to stay until we got back.

Q10 Two individuals got to leave; is that right?

A They weren't there when I got back.

Q11 Is it your understanding that if every individual would consent to a search of their person, they would be aloud to leave, and if not, they would have to wait for you to return?

A That's what I was told.

Q12 During this 45 minutes that all these individuals were there, nobody was in fear of their life?

A I think it was maybe 30—

Q13 You testified 45 in the preliminary hearing.

A Well—

Q14 During this time you were gone, all these individuals sat around with the officers waiting?

A Apparently these people weren't—we didn't suspect that they were fearful of being arrested or anything like that.

Q15 So suddenly after 30 minutes of being detained by officers, you are suddenly in fear of your life enough to search them?

A When we obtained a search warrant, we search them.

Q16 Did you search them because you had a search warrant that you thought would allow you to?

A No.

Q17 Why did you search?

A Because we had a search warrant, and if we found any narcotics in the house, the person would be arrested and advised of their rights, and I felt at that time that they were or could be a danger.

Q18 Are you changing your testimony now from the preliminary hearing and saying that you were not searching—

A No sir, I'm not. I might say that I was searching for weapons, and, of course, I found marijuana on Mr. Sadler, and I charged him with trafficing in marijuana. I was confiscating money off Mr. Rawlings, and that wasn't weapons. These things were incident to the search.

Q19 Why did you make this search again?

A I made the search because I was in fear, you know, I thought these people might have weapons or contraband, you know.

Q20 After 45 minutes, did you then suddenly—

A I wasn't there those 45 minutes or 30. I was only there for a very short time; long enough to walk through the house, and then I left.

Q21 When you returned, you were in fear of your life?

A I was going to be there for some time, yes.

MR. THOMPSON: I have no further questions.

MR. CAUDILL: I have some more questions.

RE-DIRECT EXAMINATION BY: MR. CAUDILL

Q1 You have explained that the reason you were scared when you came back was because at that time the people

knew that they could be searched, and, obviously, there were very many drugs in the house, have you noticed in your experience as a law enforcement officer that people who deal in drugs usually are armed?

A Yes sir, many times they are.

Q2 As a matter of fact, in the large marijuana case that was a week or two ago, they were armed with a 357 magnum in an automobile?

A Yes sir, I'd say the majority of cases we go on, we find some type of weapons.

MR. THOMPSON:

Q1 Were there any weapons found?

A Well, Mr. Rawlings had a knife strapped on his side.

MR. CAUDILL:

Q Mr. Rawlings had a knife strapped on his side?

A Yes sir, he did. He had a scalpel like with a knife on his side. I had forgotten all about that.

Q He did have a knife on him?

A Yes sir, he had one in a leather thing on the side, you know. That's the first thing I took off if him was a knife. I had forgotten all about that.

Q Because he had this knife on him, did this give you any reason to believe that there might be ay other weapons available?

A You know, I was a police officer also looking for weapons or contraband or whatever that's illegal.

MR. THOMPSON:

Q This is awful strange. You were using the search warrant to justify the search until I found the cases that throw that out.

MR. CAUDILL: No, Mr. Thompson, I resent you saying that.

MR. RAILEY: I had completely forgotten that he had a knife on him.

MR. CAUDILL: Now, Judge, based on this testimoney, I would argue that these officers could reasonable or were reasonably in fear of their safety when they found a large amount of LSD on Vanessa Cox. I believe that officers should be allowed some latitute when they go into a house full of people who they never seen before and have evidence that there are drugs there and have evidence that there was an LSD buy made out of that very house. One of the defendants was armed at this time.

I believe on the basis of *Terry vs. Ohio*, and on the basis of *Phillips vs. Commonwealth*, it's quoted, Judge, in here,

this opinion is based on it. I do not have it. I do have *Bayes vs. Commonwealth*, which is a 1972 case, and I think they make mention to the fact that officers are allowed reasonable latitude when they reasonably believe that they are—that their safety is jeopardized or safety of others.

In the alternative, I would argue that if the Court finds this was an illegal search that MR. Rawlings has no standing to object to this search, he was not in possession of the purse, nor was this purse under his custody or in his control. I would also cite to the Court and give to the Court numerous Kentucky cases.

THE COURT: When the contraband was found, it was in the purse owned by Vanessa Cox; is that right?

MR. CAUDILL: Yes sir.

MR. THOMPSON: Let's get a ruling on whether Judge believes that the search was justified by a fear on the officer's part.

THE COURT: All right, gentlemen, now you've got a case here; *Bayes vs. Commonwealth*. I know you have got two points there. Let me ask the officer now, just looking at the practicalities here of your carrying on your search.

The first time you went in the house, you determined who was there?

MR. RAILEY:

A That's right.

Q Did you have their names when you came down to the County Judge?

A No sir, I did not. I just walked through the house. I wasn't in the house probably a minute or minute and a half. I smelled the marijuana, and I wanted to get a search warrant and get back as soon as possible. And I didn't get their names and so forth, and I left them where they couldn't escape without getting their names or something.

Q What I was getting at was the reason for not getting a search warrant for these people just at the same time.

A I didn't know that it didn't say persons on there. I thought it did. Probably a mistake on my part.

Q Who made out that search warrant?

A Morris Lowe and Judge Griffin witnessed it.

THE COURT: Gentlemen, I'm going to take this under advisement this afternoon, but I'll give you an opinion on it early in the morning.

HEARING ADJOURNED

WARREN CIRCUIT COURT

Indictment Nos. 17107, 17108,
17109, 17110 and 17137

COMMONWEALTH OF KENTUCKY,

Plaintiff

vs.

DAVID RAWLINGS,

Defendant

Suppression Hearing
Transcript date: December 1, 1976

WARREN CIRCUIT COURT
Division II

COMMONWEALTH OF KENTUCKY

Plaintiff

vs.

DAVID RALINGS

Defendant

SUPPRESSION HEARING

On December 1, 1976, at 4:45 P.M., a Hearing was held in the above-styled manner before the Hon. J. David Francis, Judge, Division II of the Warren Circuit Court.

Appearing on behalf of the Plaintiff was the Hon. Michael Caudill, Assistant Commonwealth Attorney.

Appearing on behalf of the Defendant was the Hon. Kelly Thompson, Jr., 410 E. 11th Street, Bowling Green, KY, and the Hon. Ron Parry, Suite 200, Laywery Bldg., Newport, KY.

THE PROCEEDINGS WERE AS FOLLOWS:

MR. THOMPSON: All we seek to do at this time, Your Honor, is introduce the testimony of the defendant.

THE COURT: Because the fact that we feel it's necessary for us to establish a possessory interest in the items that were seized in order for us to have standing to chal-

lenge the seizure of these things. These were seized from another person other than the defendant.

MR. CAUDILL: Judge, he doesn't have a possessory interest in the lady's pocketbook. That was the thing searched.

MR. PARRY: Your Honor—

THE COURT: Mr. Thompson, you're going back into the same thing I've ruled on, and I remind you gentlemen you have rights of appeal, but just to keep arguing the same thing before the same Court, it's going to come to an end.

MR. PARRY: Your Honor, I believe that the law is that he doesn't have to have a possessory interest in her pocketbook, but the items seized, and that's all we seek to do is introduce—

THE COURT: Well, I believe I'll hear you on that, but I think you're wrong about it.

MR. CAUDILL: Judge, when his client takes the stand, he's fair game for all cross examination. And may we keep one agent here with us; Officer Railey?

THE COURT: Yes sir.

MR. PARRY: Your Honor, this has raised another question. It's my understanding of the law that the Commonwealth attorney would only be permitted to cross examine the defendant on matters pertaining to the things raised in the suppression hearing, not as to other matters.

MR. CAUDILL: Judge, I point out that if he's going to claim ownership of these drugs, I've got a right to explore that. Where he got them, how he came about them to develop his ownership.

THE COURT: But what I'm getting at, I want to be sure that I clearly understand and you clearly understand that that doesn't mean that this defendant necessarily has to take the stand in his own defense.

Now, do you gentlemen have any objection to Mr. Ralings, the boy's father, being here?

MR. CAUDILL: No sir.

DAVID RALINGS, having been first duly sworn on oath to tell the truth, testified as follows:

DIRECT EXAMINATION BY: MR. PARRY

Q1 State you name.
A David Ralings.
Q2 Your home addresss, Mr. Ralings.
A 107 North Ft. Thomas Avenue, Ft. Thomas, KY.
Q3 How old are you, David?

A Twenty-one.

Q4 On the 18th day of October, 1976, were you arrested in Bowling Green, Kentucky?

A Yes sir, I was.

Q5 And previous to the time that you were arrested, were you searched? Was your body searched?

A Before I was arrested?

Q Yes sir.

A No sir.

Q5 Was it after you were arrested that you were searched?

A Yes sir.

Q7 And at the time, where were you at when you were arrested?

A I was in—when I was arrested, I was sitting on the couch in the living room.

Q8 Is that in Bowling Green, Kentucky?

A Yes sir.

Q9 Is that 1264 Adams Street?

A Yes sir.

Q10 Was a young lady by the name of Vanessa Cox in or near you at that time?

A Yes sir.

Q11 In the residence?

A Yes sir.

Q12 At that time, did she have in her possession a quantity of controlled substances?

A Yes sir, she did.

Q13 Did you own any of these controlled substances?

A Yes sir.

Q14 Which of these controlled substances did you own?

A The LSD, the—I don't know the names for them.

Q15 Tell the Court what they look like.

A The LSD, the yellow and orange pills, I believe they refer to them as methaamphetamine, and there was two yellow capsules.

Q16 And other than the LSD, you don't know the chemical names or chemical compositions of these items that you claim you own?

A No sir.

Q17 How did they come to be in the possession of another person?

A I was—when we were getting ready to go pick up Vanessa Cox's car which was getting worked on, and on our way out the back door, I asked her if she would carry this for me, and she said, 'yes,' and they were placed into her

purse, and then right then at that time some people came in the back door, and I went to the restroom, and then the knock came on the front door.

Q18 My question was how did these get to be in her possession? Is it your testimony that you gave these to her?

A Yes sir.

Q19 You are charged with trafficing in methaamphetamines. Do you claim you own the methaamphetamines?

THE COURT: Excuse me, refer to those by indictment number, please.

MR. PARRY: Indictment no. 17109, you were charged with trafficing in methaamphetamines at the time you were arrested and immediately prior thereto, did you own the methamphetamines?

A Yes sir.

Q20 And Indictment no. 17107, you were charged with trafficing in amphatamines. Did you own them at that time?

A I don't know which pills they are referring to as amphetamines.

MR. CAUDILL: That indictment has been dismissed.

MR. PARRY:

Q21 Okay. And indictment no. 17108, you are charged with benzphetamine. Do you know what that is?

A I don't believe I know what that is.

Q22 Did you own a substance commonly known as diadrex?

A No sir, I didn't.

Q23 And indictment no. 17107A, you are charged with trafficing in phentabarbital. Did you own the phentabarbital at that time?

MR. CAUDILL: 17107 is LSD.

MR. PARRY: 17107A. Did you own that?

A Your Honor, is there any way I can see these? I don't recognize the name.

MR. CAUDILL: Judge, I'll just spread these drugs out here, sir. I think we're going to need our chemist in here to identify this stuff.

MR. THOMPSON: It's very simple. He allegedly possesses all the drugs except the ten pink ones marked 'Upjohn, and—

MR. PARRY: Mr. Caudill, can we stipulate what is said on the first page of the Bill of Particulars as to the items seized from the purse?

MR. CAUDILL: I'd rather not stipulate anything at this time until we go through this stuff and take a good look at it.

MR. PARRY: Are you indicating that what you've provided for us on the Bill of Particulars may not be correct?

MR. CAUDILL: There's a possibility of that, yes sir.

THE COURT: Go ahead, gentlemen.

MR. PARRY:

Q24 Now, Mr. Ralings, on this Bill of Particulars on the first page, it indicates that Vanessa Cox, who was present, was searched and was found with the following controlled substances. Number one is 1800 LDS tablets in a bottle, eight other LSD tablets is another container. And 100 other tablets of LSD in another container. Now, do you allege that you owned on October 18, 1976, all the items described under No. 1 in the Bill of Particulrs?

A Yes sir.

Q25 Number two is 200 tablets methaamphetamine. Do you allege that on that date you owned those?

A Yes sir.

Q26 Number three is ten tablets benzphetamine. Do you allege that on that date you owned those?

A No sir.

Q27 You did not?

A No sir.

Q28 Do you know who those belonged to?

A I believe Vanessa Cox has a prescription for them.

Q29 Okay, number four is three capsules phentabarbital.

A Yes sir.

Q30 You owned them?

A Yes sir.

Q31 Number five, two capsules methyprylan. Do you allege that you owned those the date and time I mentioned?

A Yes sir.

Q32 Mr. Ralings, on that date, the time the police arrived there, and after that, up until the time that you were placed in a jail, did you ever do anything to indicate that you had any intention of harming anyone?

A No sir.

Q33 Would you tell us how you were detained and what actions you went through on that day the police arrived?

A I was in the restroom at the time of the knock on the door, and I answered the knock on the door. I said, 'who is it?' And someone said, 'the State Police.' And I pulled the curtain back to look, and I believe officer Railey or one of the other arresting officers showed me an identification, the badge. And I went to open the door, and I couldn't get it

open, and I said, 'I don't know how to open this door, I don't live here.' And I said to Dennis who was in the other room—

Q34 Dennis who?

A Saddler. I said, 'The state police are at the door.' And he came over and he said that he couldn't open the door and asked them to use the back door. And then one of the officers outside said, 'Open it up or we're going to kick it down.' So I just stepped back, and the next thing I knew the police were inside. And I was in the hallway, and they asked if I was Marty Marquess. I said 'no,' and they asked me who I was. I told them. They asked everybody in the house if Marquess was around, where he was, and we all said we didn't know where he was. We assumed he was still at class. And they went through the house, looked for him, and they realized that he wasn't at home.

Then they placed us in the living room, and I asked why I was being held, and one of the officers said he smelled pot, he was going to go get a search warrant. And I kept asking why I was being held; I wasn't doing anything wrong. And they said, 'Just sit down.' You know, they sat us down in the living room and went and got a search warrant.

Q35 Were you at any time advised that you were under arrest?

A No sir, I wasn't.

Q36 Other than the officers using force to come into the premises, was there any other show of force either by the officers or by any other persons present?

A No sir, there wasn't.

Q37 Was there ever any threats of violence toward any of the officers?

A No sir, there wasn't.

Q38 Did any of the officers ever have to draw a weapon?

A No sir.

Q39 Did any of the officers ever have to use physical force to restrict the movement of the persons there?

A No sir.

Q40 Did you simply all just sit on the couch as you were told to do?

A I believe I was on the lefthand side of the couch, Vanessa Cox was to my right, Dennis Saddler was in one of the chairs, and there—Keith Northern, I believe his name is, was standing in front of the fireplace, and Linda Braden, I believe is her name, was sitting over on the righthand side of the room to me.

Q41 And how long did you sit there on the couch?
A I'd say a good 30 minutes.
Q42 What happened then?
A I asked if I could leave. I asked why I was being held there. They said they were going to get a search warrant, and then after I asked why I was being held there about thee times, two police officers came back into the room and said, 'if you all will consent to a bodily search, you can leave.'
Q43 Was this before or after the search warrant?
A Before.
Q44 And did you do that? Did you consent to a bodily search?
A No sir, I did not.
Q45 Did anyone else there consent to a bodily search?
A Yes sir.
Q46 And were they searched?
A Yes sir.
Q47 Were any weapons found?
A No sir.
Q48 Any large sticks?
A No sir.
Q49 Were they permitted to leave?
A Yes sir.
Q50 And what happened next?
A We sat around got a little bit longer, than officer Railey came back with a search warrant, read us our rights, read the search warrant, and then I was searched.
THE COURT: Excuse me, let me ask a question here. All these things we are talking about, none of them were found on this man's person? They were all found in the purse of Vanessa Cox?
MR. CAUDILL: Yes sir.
MR. THOMPSON: Money was found on his person. We have a motion to suppress the money also.
MR. PARRY:
Q51 Now, you were not searched prior to the time the search warrant arrived; were you?
A No sir
Q52 And did they exhibit to you the search warrant prior to the time they searched you?
A Officer Railey, I believe, was the only one that read it.
Q53 And after reading that to you he proceeded to search your person; is that correct?

A Yes sir.
Q54 And what did he find?
A Well, he patted me down, and found a quantity of money inside my coat pocket. He took it out and asked me what I was doing with it, and I told him, and then he placed it back into my jacket and continued to search the other people and then on to the premises.
Q55 And at that time did he arrest you?
A I had been arrested.
Q56 After he searched you, were you under arrest at that time immediately after he searched you?
A Well, he read the search warrant, and then he read the rights and then the search warrant, and then he searched me.
Q57 Okay, now, immediately following the time that he searched you, did he arrest you?
A Did he say I was—no sir.
Q58 Did he take anything at all from you.
A He took the money at first and put it back into my pocket.
Q59 Did he search Venessa Cox?
THE COURT: How was this money arranged? Was it in anything, just loose, or how?
THE WITNESS: There was a rubber band around it.
MR. PARRY:
Q60 David, did you have the same jacket on that day that you have on now?
A Yes sir, I did.
Q61 And that's a short length leather coat.
A Yes sir.
Q62 Now did any of the persons there have a weapon?
A No sir.
Q63 Did you have a knife?
A Yes sir, I did.
Q64 Where was that knife located?
A It was located on—I had it in a leather pouch on the outside. It was hanging from my belt on the outside of my coat.
Q65 Was that visible? Did any of the officers make any comment to you about what is in the pouch prior to the search?
A No sir.
Q66 And after the search, was the knife taken by the officers?
A Yes sir.

Q67 Was it at all visible from the pouch?
A No sir.
Q68 Is the pouch made for carrying a knife?
A yes sir, it is a leather pouch with a flip top on it that buttons down.
Q69 Is the knife completely enclosed in there?
A Yes sir.
Q70 And you didn't attempt to pull that knife or get in that pouch; did you?
A No sir.
Q71 Do you expect that Vanessa Cox's purse would be free from intrusion by these officers as you sat there?
MR. CAUDILL: He's calling for a legal conclusion.
THE COURT: He can answer it, but you are right about that. What he thought or didn't think or what he now says he thinks doesn't have anything to do with it.
MR. PARRY:
Q72 Did you feel that Vannessa Cox's purse would be free from the intrusion of the officers as you sat there? When you put the pills in her purse, did you feel that they would be free from governmental intrusion?
A No sir.
THE COURT: You know what, I believe this boy tells the truth. You all wanted to bring him in here and try him before the Court, and he said, 'no, I want a jury.' He said 'no, I don't understand that.' And I don't blame him for not understanding that. That's the first time I've ever seen such a thing brought on before this Court, and I've been here for quite a few years as an attorney, of course.
Now, no question but what the boy fully understood what was meant by that. None at all in the Court's mind. If you want to go ahead, you can do so.
MR. PARRY: Just a few more questions.
Q73 As you sat there with Venessa Cox next to you, where was the purse located?
A Between her and I.
Q74 And when officer Railey came with the search warrant and asked to search you or exhibited the warrant to you, did you stand up?
A No sir.
Q75Were you searched while sitting down?
ANo sir, while he read it, I was seated, and then he said to stand up; he wanted to search me.
Q76And how about Vanessa Cox; did she stand up to be searched?

A yes sir.
Q77 Did she pick up the purse or did the officer pick it up?
A I believe she picked it up.
MR. PARRY: No further questions.
MR. THOMPSON: Ask him if he expected the purse to be private.
THE WITNESS: Private? Yeah.

CROSS EXAMINATION BY: MR. CAUDILL

Q1 Did you consider that purse to be private for your personal possessions, Mr. Ralings?
A Well, I didn't expect her to go telling everybody.
Q2 You didn't expect her purse—First of all, you—did you own the purse, help to buy it or anything?
A No sir.
Q3 Did you make a habit of keeping things in her purse?
A No sir.
Q4 Had you ever kept things in her purse before?
A No sir.
Q5 Did you come to Adams Street with her on that day?
A Yes.
Q6 You came in the same car?
A Yes sir.
Q7 And whose car was that?
A Bob Stiles, I believe.
Q8 And what time did you arrive there?
A Approximately nine or ten in the morning.
Q9 And were you with her until this arrest?
A No sir, I wasn't.
Q10 When did you all split up?
A I waited there for her while she was at class—when she came back from after class.
Q11 So she left and went to class. Did she take her purse with her?
A I really don't know.
Q12 Did you put anything in her purse before she went to class?
A No sir.
Q13 When she came back, did she have her purse with her?
A I believe so.
Q14 What was her purpose for putting all these in her purse?
A I didn't want them to be seen.

Q15 Why not?
A Why not?
Q Yeah.
A It's not something you want people to see.
Q16 You know they are illegal then?
A Yes sir.
Q17 I show you approximately 2000 different tablets of LSD. First, I ask you where you got that LSD?
A Newport, Kentucky.
Q18 And when did it come into your possession?
A I don't recall.
Q19 Who did you get it from?
A Donald Booker.
Q20 And what was your purpose in obtaining that LSD?
A To give it to people that wanted it?
Q21 To give it to people that wanted it?
A Yes.
Q22 How much did you pay for it when you got it from Donald Booker0
A $110 for 100.
Q23 And was it your intent at that time to give it away to people who want it?
A To sell it to people that wanted it.
Q24 I show you approximately 200 methaamphetamine tablets and ask you where you got those.
A Same man.
Q25 Did you pay for those?
A Yes sir.
Q26 How much did you pay for them?
A $45 for 100.
Q27 What was your purpose in obtaining them?
A I took those
Q28 Now, I show you a bottle which has within it a little purple pill found to be LSD and also a capsule of pentobarbital and a capsule of methyprylan and ask you where you got thos substances.
A Everything but the pink and white ones, the same man. The pink and white one was given to me when I was down her in Bowling Green.
Q29 You disclaim ownership of the benzphetamine, and I hand you ten tablets of benzphetamine.
A Yes sir, I have never seen those before.
Q30 I show you several black balls and ask you if you can tell us what they are.
A I don't have any idea, but I can tell you where they came from.

Q31 Where?
A Vanessa Cox's purse.
Q32 Where does this man live that you got these things from?
A Newport, Kentucky.
Q33 What is his address?
A Seventh and Overton.
Q34 What does he do besides the obvious?
MR. PARRY: Your Honor, we are getting far beyond—
MR. CAUDILL: He has to prove ownership of these things.
THE COURT: I want to point out this is not before the jury. If you're going to recognize that the Court will treat it as a matter of law and not a matter of fact.
MR. CAUDILL:
Q35 What does this man do?
A I don't know. I only knew the man for approximately three weeks.
Q36 When did you first decide to come to Bowling Green with these sbustances?
A The—
MR. PARRY: Objection, Your Honor.
THE COURT: Overruled. This is a law question, I remind you.
THE WITNESS:
A The Monday before the arrest.
Q37 And how did you get to Bowling Green?
A I flew down.
Q38 And were they on your person when you flew down?
A On my person?
Q39 Yes.
A They were in the suitcase.
Q40 Were there any other drugs in the suitcase besides those?
MR PARRY: Continuing objection because I think what we're talking about is a search of the premesis a certain location of a certain date and time.
THE COURT: Stay as near the facts as you can, but If you've got some relevancy, I'm not going to limit you.
MR. CAUDILL:
Q41 How long was it before the officers got there that you put this in Vanessa Cox's purse?
A On our way out the back door apprximately three, five minutes before.
Q42 Who else was present when you placed it in her purse?

A I knew of three people present in the house before the knock on the door. When the knock came on the door, or before the knock came on the front door, we were on our way out the back door, and two people came in. I was in the restroom when they came in, and I didn't know who it was that was in the house because I was in the restroom when the knock came on the door.

I answered the door, and once the policemen were inside, I was back in the living room where they put me, and I saw everthing that went on in the house.

Q43 What was your purpose for going to that house that day?

A To wait for Vanessa Cox to get out of class.

Q44 Why were you waiting for her?

MR. PARRY: Objection, Your Honor.

THE COURT: That's where it ended up. Go ahead.

MR. CAUDILL:

Q45 Were you waiting for Vanessa Cox—why?

A We were going to pick up her car. Dennis Saddler was going to ride her and I to pick up her car.

Q46 And you were going to go with her?

A Yes sir.

Q47 Have you been dating her?

A I don't know if you would consider it dating her.

Q48 Explain to the Court exactly what the relationship is.

A I met her on a Wednesday night, the Wednesday prior to the arrest, and we talked, and we became friends, and I talked with her, and she talked with me.

Q49 So you're talking about a friendship type thing?

A Yes sir.

Q50 How did you know when you came to Bowling Green to come to this specific address on Adams Street?

A I had gone to school down here last semester.

Q51 Who did you know that lived in this house on Adams Street?

A I knew Dennis Saddler, and 1 knew Marty Marquess.

Q52 And were you staying in this house at this time?

A No sir.

Q53 Where were you staying?

A At Vanessa Cox's house on the couch.

Q54 Did you quote the price of this LSD to Mr. Saddler?

MR. PARRY: Objection, Your Honor.

A I don't recall.

THE COURT: How do you make that relevant?

MR. CAUDILL: He says it was his and in his possession, and the purpose he had was to sell it, why didn't he offer it for sale?

THE COURT: Overrule the objection.

MR. CAUDILL:

Q55 Did you offer it for sale to Mr. Saddler?

A I believe I did.

Q56 And what price did you quote Mr. Saddler?

A I don't recall the price.

Q57 How much did Mr. Saddler buy?

A I don't recall, three, five hundred.

Q58 Did you ever sell any to Vanessa Cox?

A No sir.

Q59 Did you ever sell any to Lawrence Marquess?

A Yes sir. Or no sir, no sir.

Q60 Did you ever sell it to anybody else after you got here in Bowling Green?

MR. PARRY: Objection.

The COURT: Overruled.

MR. CAUDILL:

Q61 Is there anyone else beside those people who you can tell us that you sold the LSD that you had in your possession?.

MR. PARRY: Objection.

THE COURT: Well, this is what all the argument's about. Overruled.

MR. CAUDILL:

Q62 Can you tell this Court anybody else that you sold this to or quoted a price to that can tell this Court you had that in your possession at any time?

A I believe there was one other person.

Q63 Who was that?

A I don't know his first name. He's referred to as Doc Harris.

Q64 Do you know where he lives?

A I don't know the name of the street. It's—okay, Scottsville Road comes in and goes around the sharp bend after you pass over the intersection.

MR. PARRY: 12th Street.

MR. CAUDILL:

Q66 What is the address?

A I don't know.

Q67 Describe this person.

A Tall, skinny, dark hair.

Q68 Where did you sell it to him, and where were you when you sold it to him?

MR. PARRY: Objection.

THE COURT: Overruled.

Q69 When did you sell it to him, and where were you when you sold it to him?

A I went to his house. I didn't sell it to him. It was to some other people that he knew.

Q70 Who did you sell it to?

A I don't know the people's names.

Q71 He was present when the sale was made?

A Yes sir.

Q72 Describe the house.

A It's right next to a florist type of a store.

Q73 On 12th Street?

A Yes sir.

Q74 And?

A And it's an apartment house. It's a wooden frame out front, and I believe, I'm not sure. It's maybe brick added on in the back, an extension.

Q57 And you did not have a car when you were here, how did you get there?

A Dennis Saddler loaned me his car one time.

Q76 All right. Now, you've testified that you had a knife on the day of the arrest; is that correct?

A Yes sir.

Q77 And you had a waist length coat on, and you were wearing the knife on your waist; is that correct?

A Yes sir.

Q78 And it was in a knife pouch?

A Yes sir.

Q79 All right. Do you know that these officers could not see that knife pouch?

A I didn't know.

MR. CAUDILL: That's all.

MR. PARRY: No more questions.

MR. PARRY: Your Honor, I think—I don't know how many cases Mr. Thompson sited to you, but—

THE COURT: He gave me a stack, and I read over every one of them.

MR. PARRY: —Brown vs. U.S., Jones vs. U.S., Butler vs. Commonwealth; all these cases hold—

THE COURT: I've returned them to you.

MR. PARRY: —that if you own something regardless of who happens to hold it for you, that you have standing challenges.

THE COURT: This is an awful gray area.

MR. PARRY: Now, everybody started jumping up down about him not having expectation of privacy, but that's an additional ground because that was enunciated in the case where a Union officer had union records seized from the Union office. He didn't own the building, and he didn't own the records, and it wasn't even a private office. And the Court said that he didn't have the standing to challenge it on the basis that—Dave does have ownership of the property, and he didn't have the standing to challenge it on the basis that it was his private office as some other case was set, but we are going to make a new rule here if you have a reasonable expectation of privacy there, then you can challenge it, but that's not a necessary showing in every case. The possession is all he needs to show, and in fact, I don't know even if it's necessary to come in here since the offense itself requires possession as a necessary owner.

Many cases I'm sure that Mr. Thompson said that—

THE COURT: I want to point out that it's your idea. I felt like I have had a pretty full day before we started.

MR. PARRY: I understand.

MR. CAUDILL: Your Honor, I'd like to point out that there's also a case called Walters vs. U.S., and in that case it says, 'where you have a factual situation where a co-defendant deposits drugs in another co-defendant's purse, that that defendant does not have standing to challenge the search because he does not have a reasonable expectation of privacy,' and this defendant himself has told the Court that he did not himself feel that he had a reasonable expectation of privacy in her purse.

THE COURT: Gentlemen, the Courts have decided this question both ways as you all well know, and several of them Mr. Caudill gave me, and I think you had given me a citation on one that I have a set of Kentucky Decisions at home that I read. This is a kind of gray area. I think you have made your record good, and I'm going to overrule your motion to suppress. We'll start trial Thursday morning at 10:00.

MR. THOMPSON: Your Honor, the issue of standing would not in any way effect the money that was on his person. He definitely has standing for the money?

THE COURT: Ya'll haven't argued that but very little. And the only thing I have passed on at this time is these pills.

MR. CAUDILL: Judge, I'd like to point out when we had this other hearing, this was justified on a search for weapons; pat down search.

MR. THOMPSON: He stated he knew it was money, and he saw it was money.

THE COURT: I recall he said it was a wad in the breast pocket or inside breast pocket, and that he reached in and pulled out the money, and he saw the money, and returned it.

MR. CAUDILL: Of course, I would like that record to be made part of the record.

MR. PARRY: Your Honor, it was my understanding that the searches of the person although they were not valid under the warrant, they were valid because the officers had some fear for their lives or something?

THE COURT: I have said that the search would be valid for weapons, but you gave it a preface that I didn't give it.

MR. PARRY: Okay, I'd like to cite to the Court the case of Terry vs. Ohio, and it's a stop and frisk case, the first one that enunciated the fact that a police officer can stop someone with less than probable cause, and that case says that the officer must be able to articulate some facts not just a mere hunch, but some fact to show the Court why he was afraid for his life. I don't know what the officers testified to, but it's my udnerstanding that he said he feared for his safety, and I suggest to the Court that the physical facts are exactly contrary to that because the people had done nothing but sat there for over a half an hour and waited.

THE COURT: Let me point out how much what you say is a contradiction. You say on one hand that Mr. Railey had no right to fear for his life when he's over here in a house on Adams Street, and yet at the same time when there were a few scattered people sitting back in the courtroom who were not interested in this case but were the parents of a girl in the preceding case and started to have this hearing up in front of the bench, and the Court—and the suggestion was that we retire to chambers here for fear of your client's life. So I don't know. I'm not going to say that— or I'm not going to rule that as a matter of law that an officer making a search of numerous people who one of them was carrying a, and the word is 'sheath' if you fellows will get your terminology straight, you carry a knife in a sheath, not a pouch, and I don't know where it is. I'd like to see it, and I don't know why you fellows didn't bring it today because

you know it's somewhat in issue here, and I've got a little knife I carry here that's a relic of the Southern Railroad that they let me board airplanes with.

From the way you describe it, I don't think they'd let Mr. Rawlings board an airplane with his knife in the sheath. Now, I don't know why the officers didn't arrest him for carrying a consealed deadly weapon or I'm just guessing what it is. But in any event, here is this fellow carrying a heck of a bunch of drugs with him. And I know that this other fellow is indicted. He hasn't been tried yet and I don't know, but there's a quantity insofar as the market's concerned. So I'm not going to hold as a matter of law that these officers didn't have a right to search for the weapons under the circumstances at all.

MR. THOMPSON: May I point out that you can't justify the search by hindsight.

THE COURT: This is what you want to do because they didn't find any weapons, they weren't entitled to search.

MR. THOMPSON: I'm talking about the situation they had to reasonable ground to believe there were weapons there.

THE COURT: Well, I'll let you fellows argue that to another Court.

MR. THOMPSON: One more point. The money that was on him, I've made a written motion to suppress the money because he does have standing in that area. And the warrant does not authorize the search of his body so we once again move for the suppression of the money which was found on his person.

THE COURT: Overrule.

Okay, the defendant has come back in front of the Court together with his lawyers, Mr. Parry and Mr. Thompson and his father, Melvin Rawlings. And they advised the Court that they want to renew their motino to have this case tried solely before the Court.

MR. PARRY: That's correct.

THE COURT: I might point out that when they walked in the room, Mr. Rawlings said that he wanted to see the Court, and the Court advised him that he ordinarily talked to the Court—or persons indicted or parties to Court actions through the attorneys, but then I saw that they were here so I had what he had to say. And at that time he himself advised me that he wished to be tried only by the Court.

What do you have in mind here, gentlemen?

MR. PARRY: We've discussed this at some length, and this is maybe the reason for Mr. Rawlings confusion before because we had talked about trying it before the Court and then trying it before the jury, and I think our final decision, mind and Mr. Thompson and the advice that we have given to Mr. Rawlings is that the case be tried to the Court rather than to the jury. I think he understands that, and I think the reason he gave you an ambiguous answer before was that we had talked about it so much one as opposed to the other, and he wasn't clear that we had made a decision. And I think he's clear now that our advice to him is to try it to the Court without a jury.

Now, have I misstated anything, Mr. Rawlings?

THE DEFENDANT: No sir.

MR. PARRY: Is this your intention—you know that you have a right to a jury, and not Mr. Thompson, myself, or anyone else here can take that away from you?

THE DEFENDANT: Yes sir.

THE COURT: Let me question him. Let me tell you a little about history. You know a long time ago, really, when our forefathers established this country and set up our form of government which guarantees some freedoms that people in some countries don't have, one of the main things that they established was that the state, and to an extent I represent the state in Bowling Green. This Judge of this Court can't just try somebody nor could the state if the Commonwealth's attorney in Bowling Green— they can't just prosecute someone without a jury. That's the accused person's peers making the decision themselves about whether or not a person is guilty. That's a very very precious freedom and a guarantee of freedom that we have in this country that more than half of the people in the words do not have.

Now, I appreciate your— you might feel like you're a rock in the hard place or whatever you want to say, but it's not a choice of one good and one bad but here; one bad and the lesser of two evils, and whatever that is. But you sure that you fully understand what you're doing? Now, you realize that in this suppression hearing you have told me already that you are really guilty of these charges except for the lgal entanglements of whether or not the matters, the pills and so forth can be exhibited to the jury at all. In other words, you've said to me that you owned these pills and that you sold some to, I believe somebody named Dennis Saddler and somebody out on Broadway or 12th Street or whatever, and the jury doesn't know that, and I just don't really know about that.

I'll be glad to hear— I'll only do this with the consent of the Commonwealth.

MR. CAUDILL: Your Honor, it's all right with us. This is just a compliment to you that they would even want to entrust it to your discretion, and we'll entrust it to your discretion also.

MR. PARRY: I think you realize that if there's a complete lack of evidence presented by the Commonwealth, and we don't anticipate that, but if there is that you cannot consider the evidence given in the suppression hearing.

THE COURT: I realize that.

MR. PARRY: But to the best of your ability as a human being to separate the two.

THE COURT: You realize that the old story about you can't unring a bell, and you can't come in here and tell me I owned these and had these and tommorrow say I didn't know about them.

MR. PARRY: So what we anticipate or what we have told Dave is that it's a very close question to inner sense of guilt and the fact that you are a human being and heard him in this suppresion hearing may tilt you over the other way toward guilt rather than innocence. On the other hand, we have told him if there's a complete lack of evidence, you know, you will put the evidence out of your mind, and that is our advice to him.

THE COURT: I want to hear from you Mr. Rawlings. You understand that you already in effect told me that were it not for the legal barriers for the introduction of the evidence, that you are guilty of these charges. Now, the jury doesn't know that. And I've ruled, you understand, that they are entitled to introduce these pills and this mondy into evidence. Now, if you want to take your chance with the Court rather than the jury—I realize that you're an intelligent young, man, and you're very ably represented by two competent lawyers, and your father being present as well, and the conversation I had with you before, you said you were 22?

THE DEFENDANT: Twenty-one.

THE COURT: Twenty-one years old, and I'm going to sustain your motion and let you be tried before the Court.

Now, this is a decision; right?

THE DEFENDANT: Yes sir.

MR. PARRY: Clarify if he admitted possession of the LSD for sale, speed for use, and he didn't know about the two of them.

THE COURT: I've got the one of them.
MR. PARRY: Did you know about the nodulars?
THE DEFENDANT: No.

HEARING ADJOURNED

OPINION RENDERED: February 17, 1978
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY
NO. CA-1185-MR

COMMONWEALTH OF KENTUCKY

Appellee

DAVID RAWLINGS

Appellant

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE J. DAVID FRANCIS, JUDGE
ACTION NOS. 17107, 17108, 17109, 17110 & 17137

AFFIRMING

* * * * * * *

BEFORE: HOWERTON, REYNOLDS and LESTER, Judges.

REYNOLDS, JUDGE. Appellant was found guilty upon trial in Warren Circuit Court and convicted of the possession of drugs for the purpose of sale. He maintains that the court failed to suppress evidence which resulted in violation of his constitutional rights.

On October 18, 1976 police officers, with an arrest warrant for Lawrence Marquees, entered his residence at 1264 Adams Street in Bowling Green. Upon entering the premises the officers found the appellant David Rawlings, Vanessa Cox, Linda Braden, Keith Northern and Dennis Sadler. The officers smelled marijuana smoke in the residence and observed marijuana seeds in plain view while searching for Marquees. Marquees, who was under indictment for trafficking in Schedule I controlled substances, was not found. The individuals found on the premises were requested to sit in the living room while some of the officers went to the nearby courthouse to obtain a search warrant. Two of the five individuals were permitted to leave after submitting to a search. Some 30-45 minutes thereafter the

departed officers returned with a search warrant for the premises. The warrant did not authorize a search of individuals on the premises. A purse, lying on the couch between Ms. Cox and appellant, was ordered to be emptied, and a large amount of controlled substances was emptied onto the table. Ms. Cox informed the officers that the drugs belonged to the appellant and told him to take what was his. Appellant admitted ownership of the drugs. Upon standing up he was observed to have a sheath containing a knife attached to his belt and a bulge was observed under his clothing. A pat down search revealed $4,500 under his clothing. He was placed under arrest. Prior to trial appellant moved for a suppression of the evidence and the motion was denied.

Essentially, he contends that he had standing to complain about the search of Ms. Cox's purse; that the search of Ms. Cox's purse was not authorized by the warrant, based on probable cause, or justified by the exigencies of the circumstances involved; that the search warrant for the premises did not authorize the search of all persons on the premises; and that their detention was not based upon probable cause and was, in effect, unreasonable restriction of their freedom.

We hold that the appellant, to utilize the exclusionary rule, must have standing to challenge the constitutional violation which serves as the basis of the law's application. Before *Jones v. United States*, 362 U.S. 257 (1960), the Constitution was interpreted in such a manner that the 4th Amendment protected only places and things. If there was no proprietary interest, there was no standing granted to claim a violation of constitutional rights. *Jones, id.*, established automatic standing for one charged with a possessory crime. Anyone who was legitimately on premises where a search occurs may challenge its legality by a motion to suppress where the evidence is going to be used against him. There was no allegation in this case that appellant was not legitimately on the premises. *Simmons v. United States*, 390 U.S. 377 (1968), filled a void remaining after the *Jones, supra*, decision. *Simmons, supra*, provides that when a defendant has given incriminating evidence at a suppression hearing, the evidence is not allowed to come into evidence at the trial. We are not persuaded by appellee's argument that extending the reasoning in *Brown v. United States*, 411 U.S. 223 (1973) would cause the appellant to lose standing in this case. Appellant's standing is

not based on a reasonable expectation of privacy to the contents of Ms. Cox's purse. The expectation of privacy goes to the issue of whether the evidence should be suppressed after standing is determined. Appellant did have standing to protest the search of Ms. Cox's purse.

Both appellant and appellee have placed reliance upon the phrase, "reasonable expectation of privacy," which was first used in the case of *Katz v. United States*, 389 U.S. 347 (1967). Whenever a reasonable expectation of privacy exists, the government, before proceeding, must either produce a warrant or there must be exigent circumstances to justify proceeding without a warrant. Although the appellant said at the second suppression hearing that he did not feel that the drugs he had placed in Ms. Cox's purse were free from governmental intrusion, we do not base our opinion thereon.

The *Katz, id.*, decision has its greatest impact on constitutional law before the zone of privacy is pierced. Here the police entered the rooming house pursuant to a valid arrest warrant. They smelled marijuana and saw seeds on a mantel. The police have pierced the zone of privacy lawfully, and there is no argument that can be properly founded on *Katz, supra*. The officers had a legal right to be in the rooming house; their discovery was inadvertent in that they did not have probable cause to believe they would see and smell marijuana upon their entry; the fact that marijuana was present was immediately apparent to the officers; there were exigent circumstances that would have authorized an immediate arrest of those sitting in the room since a misdemeanor was committed in the officers' presence (although this was not done). Appellant's reliance upon the reference in *Henry v. United States*, 361 U.S. 98 (1959) to *Johnson v. United States*, 333 U.S. 10 (1948) is not persuasive in that the arrest and search warrant in the case at bar were not based merely on the smell of marijuana coming from a *closed* room (emphasis added). Appellant's reliance upon *Johnson v. Commonwealth*, Ky. 443 S.W.2d 20 (1968) and K.R.S. 431.005 is not well founded factually. Since the officers smelled marijuana immediately after entry, a misdemeanor was committed in their presence since such smell would be probable cause to warrant a prudent man to believe that an offense had been committed. The smell of contraband is a sufficient basis for a police officer to believe that a crime is being committed in his presence. See *United States v. Bowman*, 487 F.2d 1229 (10th

Cir. 1973); *United States v. McCormick*, 468 F.2d 68 (10th Cir. 1972); *United States v. Compos*, 471 F.2d 296 (9th Cir. 1972); *People v. Chestnut*, 351 N.Y.S.2d 26 (1974); *People v. Loe*, 306 N.E.2d 368 (Ill. 1974); *State v. Elliott*, 499 P.2d 342 (Or. 1972). Also, in *Johnson v. United States*, *supra*, The Supreme Court at least implicitly recognized that the detection of the odor of contraband, coupled with other circumstances noted here, could provide adequate grounds for either the issuance of a warrant or immediate arrest.

In any event, detention of those within the rooming house was proper. If a formal arrest is not made until after a search, the search will be upheld so long as there is probable cause for an arrest before the search is begun. See *Bailey v. United States*, 389 F.2d 305 (D.C. Cir. 1972); *United States v. Gorman*, 355 F.2d 151 (2nd Cir. 1965); and *United States v. Brown*, 463 F.2d 949 (D.C. Cir. 1972).

We are in agreement with appellant's general proposition that a search warrant for premises does not authorize the search of all persons located on the premises. Normally a warrant to search premises provides no basis for the search of people who just happen to be there are are not connected in any way with the premises being searched. See *United States v. Di Re*, 332 U.S. 581 (1948). *State v. Bradbury*, 243 A.2d 302 (N.H. 1960), relying upon dictum in *Di Re*, *supra*, held that a search warrant for narcotics in the dormitory room of a female university student did not provide a basis for the search of a male who was seated in her room. These cases, however, are distinguishable from the case at bar. First, the officers in the case at bar were in a place where they had a right to be and inadvertently smelled marijuana smoke and saw marijuana seeds in plain view. Second, the purse that was searched was not worn by Ms. Cox and did not constitute a search of her person.

United States v. Johnson, 475 F.2d 977 (D.C. Cir. 1972) involved similar issues to the case at bar. There police had obtained a warrant authorizing a search for narcotics of the entire apartment of one James L. Stewart. After entry was obtained, some officers went to the living room where Ms. Johnson was found sitting on the couch. A purse, which was on the coffee table in front of the couch, was immediately searched and narcotics were found. Ms. Johnson was a visitor on the premises. In holding that this evidence should not have been suppressed, the Court said at page 978–9:

> The prohibition of the Fourth Amendment is against "unreasonable" searches and seizures. In determining whether under the circumstances of this case the search of appellee's purse violated that standard, the protection of individual privacy embodied in the Fourth Amendment must be weighed against the public interest in effective law enforcement with respect to narcotics violations. The specific question for resolution is whether the scope of the search warrant embraced an object in the apparent possession of a person not an occupant of the premises searched. Although the District Court did not expressly consider this issue, its suppression of the evidence contained the implicit holding that appellee's purse fell without the warrant.
>
> Turning first to the privacy element of the question, we note that the search was of a purse resting separately from the person of its owner. As such, it was not being "worn" by appellee and thus did not constitute an extension of her person so as to make the search one of her *person*. *United States v. Teller*, 397 F.2d 494 (7th Cir. 1968); *United States v. Riccitelli*, 259 F. Supp. 665 (D. Conn. 1966).

The *Johnson*, *supra*, opinion stated that the police could reasonably have believed that items sought and described in the warrant had been concealed in the purse and notwithstanding appellee's status as a visitor, they could have searched the purse in pursuit of items for which the warrant was issued. The reasoning in *Johnson*, *supra*, has been followed in *Commonwealth v. Show*, 298 N.E.2d 804 (Mass. 1973) *State v. White*, 538 P.2d 860 (Wash. 1975); and *People v. Colombo*, 244 N.W.2d 3 (Mich. 1976).

There is an exception in drug cases to the general principles in *Di Re*, *supra*, and *Bradbury*, *supra*. When drugs are involved, all people present can be searched because drugs can be passed easily, allowing easy concealment of evidence. "The execution of search warrants in narcotics cases is a risky business at best, and unless the police search all persons present on the premises they endanger both themselves and the search they are making." *People v. Pugh*, 217 N.E.2d 557 (Ill. 1966). We note in passing that under the rationale in *Pugh*, *id.*, those who come in during a search should only be subjected to a pat down. See also *United States v. Branch*, 545 F.2d 177 (D.C. Cir. 1976).

Appellant further contends that the $4,500 found on his person should have been suppressed. At the time appellant was subjected to a pat down, a gun with live shells had

been observed, 1,800 tablets of LSD and 215 tablets of other drugs had been found in the purse that was beside him, and a knife in a sheath had been noticed at his side. *Terry v. Ohio*, 392 U.S. 1 (1960) set forth the basic law as to when it is proper to stop and frisk. The 4th Amendment applies to a stop and frisk situation because there is an invasion of privacy. But only the "reasonableness" language of the 4th Amendment is looked to when a stop and frisk is conducted. The need to stop and frisk is balanced against the invasion of privacy that the frisk entails. Here the officers, given the facts known to them at that time, had a "reasonable" suspicion that appellant was armed. Before appellant's pat down there had been an inquiry period and the frisk that was conducted was limited in scope. The appellant was carrying 161 different bills which were approximately ¾ of an inch thick and were wrapped up with a rubber band. This bulge gave the police probable cause to go into appellant's pocket. This money, along with the drugs that were found and Ms. Cox's statement to appellant (that he should take what was his) certainly gave probable cause to arrest appellant.

"We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the federal constitution, be deemed harmless, not requiring the automatic reversal of the conviction." *Chapman v. California*, 386 U.S. 18 (1967). Here appellant's conviction rested upon a quantum of untainted evidence even if the money had been suppressed. Therefore, any error was harmless beyond a reasonable doubt since possession of over 2,000 tablets of various controlled substances diminishes the supposition that the drugs were intended for personal use only and would sustain this conviction. *Harrington v. California* 395 U.S. 250 (1969) and *Milton v. Wainwright*, 407 U.S. 371 (1972).

The judgment of conviction is affirmed.

ALL CONCUR.

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COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. CA-1185-MR

COMMONWEALTH OF KENTUCKY

Appellee

DAVID RAWLINGS

Appellant

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE J. DAVID FRANCIS, JUDGE

ACTION NOS. 17107, 17108, 17109, 17110 & 17137

ORDER DENYING PETITION FOR REHEARING

BEFORE: HOWERTON, LESTER and REYNOLDS, Judges.

The Court having considered the Petition for Rehearing and being sufficiently advised, it is ORDERED that the same is hereby DENIED. The Dissent of Lester, J., as attached, is hereby appended to the opinion of this Court rendered February 17, 1978.

JUDGE, COURT OF APPEALS

ENTERED: *June 9, 1978*

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. CA-1185-MR

COMMONWEALTH OF KENTUCKY

Appellee

v.

DAVID RAWLINGS

Appellant

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE J. DAVID FRANCIS, JUDGE
ACTION NOS. 17107, 17108, 17109, 17110 & 17137

DISSENTING OPINION

BEFORE: HOWERTON, REYNOLDS, and LESTER, Judges.

LESTER, JUDGE, DISSENTING. Even though my colleagues have reviewed the facts, I believe it necessary to repeat some of those in order to support my reasons for dissenting.

In the middle of the afternoon of October 18, 1976, some six police officers, members of both the Kentucky State Police and a local law enforcement agency, armed with a warrant of *arrest*, went to a home in Bowling Green, Kentucky, for the purposes of taking into custody a resident of that building, namely, Lawrence Marquees. Upon arrival at the home, the officers found it necessary to enter the premises forcefully and upon gaining entrance, they found five individuals situated therein, including the appellant, and one of the residents of the house, but not Marquees. The police claimed they detected the odor of marijuana. Their discovery of this alleged pungency is described by a Commonwealth witness in the following language:

> And then one of them said, 'I think I smell pot; don't you?' And the other one said, 'Yeah, I believe I do. Let's get a warrant.'
> And then?
> And so then we were all detained there until they got back with the search warrant.

Upon their arrival, the officers found no marijuana, no residue thereof, no attendant paraphernalia and saw no one in possession or using the drug. As a matter of fact, the evidence for the Commonwealth is uncontradicted that on the day in question, there was no use of marijuana on the premises.

The officers proceeded to walk through the several rooms and in a bedroom, across a hallway from the living room, they saw a shotgun and marijuana seeds. At this juncture, the five people who were present were corralled into the living room and the officer in charge of the group concluded that it would be necessary for him to travel to the courthouse to obtain a search warrant for the *premises*. Upon leaving and going to a point of approximately two blocks from the house, Detective Railey observed Marquees and effected an arrest before reaching the Commonwealth's attorney's office.

With the departure of the officer seeking the warrant, one of the remaining five or six enforcement agents told the people present in the living room that they could not leave the premises unless they subjected themselves to a search. This restraint was so absolute that when one of the detainees requested to go to an adjoining room to get a drink of water, he was not allowed to do so. Although the Commonwealth maintains that no one was arrested until after Detective Railey returned with the search warrant for the *premises*, the law is to the effect that at such time as the police told those present that they could not leave the house until they permitted a search of their persons, they were, in fact, under arrest. Our opinion in this appeal completely overlooks the language of *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 903, 88 S. Ct. 1868 (1968) to the effect:

> Our first task is to establish at what point in this encounter the Fourth Amendment becomes relevant. That is, we must decide whether and when Officer McFadden "seized" Terry and whether and when he conducted a "search." There is some suggestion in the use of such terms as "stop" and "frisk" that such police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of a "search" or "seizure" within the meaning of the Constitution. We emphatically reject this notion. It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecution for crime—"arrests" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person.

See also *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 1707 86 S. Ct. 1602 (1966) where the Court employed the phrase "or otherwise deprived of his freedom of action in any significant way."

It is clear to me, under the foregoing authority, that when appellant was advised that he could leave the premises only after being subjected to a search that he was significantly deprived of his freedom of action and thus under arrest.

Having concluded that Rawlings was in custody, I now turn to the question of whether there was probable cause for the officers to seize his person.

It requires no citation of authority to note that an officer may arrest an individual when that person commits a misdemeanor in the policeman's presence. The law enforcement agent must *observe* the offense but more importantly, he must also observe the actor so engaged in the illegal activity. In the case before us, absolutely no one was seen doing anything and no one witness so testified. Without so concluding, if the odor of marijuana were sufficient to say someone was in possession thereof, then, on October 18, 1976, who had it? The answer is that at the time of the arrest, no one did and the police so admit.

The blatant omission in the Commonwealth's case is that if they considered a misdemeanor being committed in their presence, then who was committing the misdemeanor? This remains unanswered. It can hardly be said that there is an offense in this jurisdiction of possession of an odor and if possession of an odor is an offense, then who was in possession thereof? We believe that even though not a member of the legal profession, Officer Railey, who led this raid, most succinctly put it in the following questions and answers:

Q If you smelt (sic) marijuana in the air, would you expect that to be evidence of a misdemeanor or felony?

A It appeared to be a misdemeanor at that time.

MR. CAUDILL: Judge, he wouldn't know that.

A I wouldn't know that because that smoke in the air is not a violation at all. I'd have to refer where it came from or something.

My brothers reject the principles announced in *Johnson v. United States*, 333 U.S. 10, 92 L. Ed. 436, 68 S. Ct. 367

(1948) stating that the opinion "is not persuasive in that arrest and search warrant in the case were not based merely on the smell of marijuana coming from a *closed* room." I find the implied comparison between a closed room and an open one to be a distinction without a difference. As I view it, *Johnson*, *supra*, stands for the proposition that the smell of contraband, standing alone, will be insufficient for a warrantless search but will form a basis for presentation to a magistrate upon application for a search warrant. If an odor is improper cause for a warrantless search, then, a fortiori, it cannot serve as a foundation for arrest of a person. The observation of several needs in a nearby bedroom of the occupant of a house is not an exigent circumstance to add to smell to authorize this violation of appellant's Fourth Amendment rights. Since there is no limitation upon the rule announced in our opinion in this case, then it would be possible to place everyone in Rupp Arena under arrest in the event some few of them were smoking the drug and officers observed seeds lying about. On the other hand, it would be virtually impossible to promulgate guidelines to limit our opinion for shall we say an open room or a closed room, one person or a hundred people, one type of drug odor and not another?

Johnson, *supra*, as well as many other opinions, stand for the rule that the search may not justify the arrest while *Henry v. United States*, 361 U.S. 98, 4 L. Ed. 2d 134, 80 S. Ct. 168 (1959) dictates that before police can restrict one's liberty—which is an arrest—there must be probable cause for so arresting. If there are reasonable grounds to believe that the detainee has committed a felony, the seizure of his person is proper as is the arrest of one who commits a misdemeanor in the presence of an officer. In the case at bar, the Commonwealth contends that a misdemeanor had been committed in the presence of Railey and his compatriots but for reasons hereinabove set forth, I disagree with that premise. The majority would circumvent the mandates of *Johnson* and *Henry* because in addition to the smell, they observed a few seeds in the householder's (who was not present) bedroom which was separate and apart from the room where appellant was situated. The second circumstance which my brothers rely up to distinguish this cause from the cited cases, is that drugs were later found in one of the arrestee's purse but those were the fruits of an illegal arrest and thus an illegal search.

The opinion herein seeks to avoid *United States v. Di Re*,

332 U.S. 581, 92 L. Ed. 210, 68 S. Ct. 222 (1947) (which stands for the proposition that a search warrant for premises does not authorize the search of all persons located thereon) for the same reasons applied to *Johnson* and *Henry* in spite of the fact that the majority agree with *Di Re*. I see no valid distinguishing factors between the case at bar and *Di Re*.

It cannot be argued that the police had probable cause to arrest Rawlings and his friends upon the grounds of preserving evidence for at the time, they were unaware of any evidence that had to be preserved. Prior to entering the quarters, not one police official had ever known of or had seen any of the parties they seized and it can hardly be said that they had any reason to believe that they were in possession of drugs. The most that the detainees could be said to be in possession of is some vapors which the evidence revealed they did not create.

Even though I do not believe that this case goes any further than the illegal arrest which was effected soon after the officers entered the dwelling, I believe some brief comment should be made concerning the search of the woman's purse and the person of appellant.

After all witnesses for both sides of this litigation agreed to the congenial atmosphere existing during the forty-five minute interval while Railey apprehended Marquees and obtained the search warrant, there is an almost unbelievable change at such time as the detective returned. The unconvincing testimony of the police is to the effect that once the search warrant was read that they all experienced fear for their safety eminating from what is now three detainees (as compared to five or six armed men) to such an extent that it became necessary to go beyond the "pat down" search as described in *Terry*, *supra*, (but not authorized by that case in circumstances such as this) and conduct the in depth or inside the outer clothing search. This was done in spite of the fact that the officer examining appellant testified that after the pat down, he knew Rawlings had no gun where a bulge appeared to be under his arm. It is incredulous that the policeman experienced the sudden fear they claimed they did after joining with Rawlings and his friends for better than a half hour in listening to phonograph records.

Insofar as the opinion authorized the search of a woman's purse laying on a couch immediately next to her person pursuant to a search warrant for the premises, I can only

add that I am unwilling to extend to this jurisidiction the rule as enunciated by the Court of Appeals for the District of Columbia, Massachusetts, Michigan and Washington. In the first place, Kentucky is not bound by those decisions and in the second place, under our opinion in this appeal, it would be necessary for every woman to clutch to her person that very integral part of her apparel in order to avoid a search of it when illegally detained.

The opinion in this cause concludes that some constitutional errors are so unimportant and unsignificant as to be deemed harmless citing *Chapman v. California*, 386 U.S. 17, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967). I should first point out that the Court reversed the conviction of Chapman for violation of her constitutional rights. I, for one, am unwilling to participate in the denial of a litigant's Fourth Amendment rights such as are delineated in *Terry, supra*, and was so done in this case on the grounds that the error was insignificant and unimportant. I would rather subscribe to the principle of *Henry, supra*, in that

> It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than the citizens be subject to easy arrest.

For the reasons stated herein, I dissent.

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SUPREME COURT OF KENTUCKY
78-SC-324-D
(CA-1185-MR)

COMMONWEALTH OF KENTUCKY
Respondent

V.

DAVID RAWLINGS
Movant

WARREN CIRCUIT COURT
17137

ORDER GRANTING DISCRETIONARY REVIEW

The motion of David Rawlings for a review of the decision of the Court of Appeals is granted.

The clerk of the Court of Appeals is directed to transfer to the clerk of the Supreme Court the entire record in this proceeding, File No. CA-1185-MR.

Entered November 14, 1978.

Chief Justice

SUPREME COURT OF KENTUCKY
78-SC-324-DG

COMMONWEALTH OF KENTUCKY

Respondent

V.

DAVID RAWLINGS

Movant

ON REVIEW FROM COURT OF APPEALS
CA-1185-MR
(Warrent Circuit Court No. 17134)

OPINION OF THE COURT BY
JUSTICE STEPHENSON

Affirming

David Rawlings was convicted of the possession of controlled substances for the purpose of sale, KRS 218A.990, and sentenced to a term of five years' imprisonment in the penitentiary. The Court of Appeals affirmed. We granted discretionary review and affirm.

Police officers with a warrant for the arrest of a Lawrence Marquess forcibly entered his residence. Five individuals, including the movant David Rawlings, were found in the living room of the residence. During the course of the search of the residence for Marquess, the officers noted the odor of marijuana and in another room observed marijuana seeds on a mantel. The officers then determined that a search warrant was indicated, and one or two of the officers left to procure a search warrant. During the period of forty-five minutes wait for the two officers to obtain the search warrant, the five individuals, including Rawlings, were detained in the living room and were informed by the officers that they could not leave the room unless they consented to a search of their person; two of the individuals were permitted to leave after submitting to a search. After the indicated lapes of time, the officers returned with a search warrant, authorizing a search of the premises. There was no authority for the search of individuals on the premises.

One of the individuals remaining in the living room, a Vanessa Cox, was seated on a couch with her purse lying on the couch between her and Rawlings. The officers ordered Vanessa Cox to stand and empty her purse on the table. The purse was emptied of a large amount of controlled substances, and Vanessa Cox informed the officers that the drugs belonged to Rawlings. Rawlings admitted to the officers that he was the owner of the drugs. Rawlings, prior to the arrival of the police officers, had placed the drugs in the purse belonging to Vanessa Cox.

From our review of the record, when the officers returned with the search warrant for the premises, they decided to search all the individuals. While the purse belonging to Vanessa Cox was being emptied, Rawlings was asked to stand. Then came the admission as to being the owner of the drugs. Thereupon Rawlings' person was searched. The search yielded a wad of bills, in the amount of $4,500, and a knife in a sheath. Rawlings was then placed under arrest. The exact sequence of events here is not clear from the record.

At a pretrial suppression hearing, the trial court ruled that the drugs and money were admissible into evidence. During the course of the trial, both the drugs and the money were the subject of testimony and both were introduced as exhibits.

The concept of "standing," to raise a Fourth Amendment violation argument with respect to the drugs in the purse, occupies a great deal of the argument by both Rawlings and the Commonwealth. The trial court determined that Rawlings did not have "standing." The Court of Appeals, after a lengthy analysis of case law, determined that Rawlings did have "standing" but decided that the search of the purse was not invalid and affirmed the judgment of the trial court.

The central issue in this case is the warrantless search of Vanessa Cox's purse. In resolving this issue, we are confronted with the proposition of "standing" on the part of Rawlings to raise the Fourth Amendment issue and the ulimate issue—the merits of the Fourth Amendment argument. "Standing" is a largely theoretical concept. Learned texts on the subject abound. The United States Supreme Court has written many times and at length on the subject. It is almost impossible to separate the concept of "standing" and the principles of law on the merits. The concept of "standing" is theoretically separate from a defendant's

rights under the Fourth Amendment but is so interwoven that discussion of one overlaps the other. All in all we confess that we find the concept of "standing" totally incomprehensible and, to the extent of overlap with Fourth Amendment rights, equally incapable of understanding. So in approaching the central issue in this case, we prefer to speak in terms of substantive right under the Fourth Amendment. We have considered Rakas v, Illinois, ___ U.S. ___, 99 S.Ct. 421, 58 L.Ed2d 387 (1978); Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed2d 1247 (1968); Jones v. United States, 362 U.S. 257, 80 S. Ct. 725, 4 L.Ed2d 697 (1960); U.S. v. Johnson, 475 F .2d 977 (DC Cir. 1972); and Sumrall v. United States, 382 F .2d 651 (10th Cir. 1967). We are of the opinion the evidence obtained by the search of Vanessa Cox's purse was properly admitted at trial. We feel that Rawlings probably does not have standing to raise the issue here. Jones apparently would confer standing on the theory that possession of the drugs both convicts and confers standing since the offense here is possession, admitting ownership is admitting guilt. Here the defendant did not find himself in that dilemma, he admitted ownership of the drugs when they appeared from the purse and Vanessa Cox stated the drugs belonged to him. Further, *Simmons* established that evidence to show standing is not admissible, over objection, on the issue of guilt. We are not sure of the effect of *Rakas* although it seems to reject the theory of *Jones* on "standing." We are of the opinion that the search of Vanessa Cox's purse did not violate Rawlings' legitimate or reasonable expectation of freedom from governmental intrusion.

For what it is worth, Rawlings testified at the suppression hearing that when he placed the drugs in Vanessa Cox's purse, he did not expect or feel that the purse would be free from the intrusion of the officers. There is the factor of the risk that Vanessa Cox might consent to a search of her purse together with the always present possibility of inadvertent exposure of the drugs. Considering the totality of the circumstances, we are of the opinion the search did not violate Rawlings' legitimate or reasonable expectations of freedom from governmental intrusion into the purse and that Rawlings has not made a sufficient showing that his legitimate or reasonable expectations of privacy were violated.

The money found on Rawlings' person was admitted into evidence at trial, the knife was not. This search was not

explored in detail at the suppression hearing, other than a denial of the motion to suppress. This issue does not involve such complicated principles as the search of the purse, and we prefer to validate this search on the theory of a search incident to a valid arrest. In arriving at this conclusion, we disregard as irrelevant the detention during the period in which the officers were procuring a search warrant. As we have said, the sequence of the search of the purse and Rawlings' admission of ownership of the drugs is not clearly established in the record. Clearly, after Rawlings admitted ownership of the drugs, the officers were entitled to arrest and search the person, or search and then arrest. Cupp v. Murphy, 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed2d 900 (1973).

The opinion of the Court of Appeals is affirmed.

All concur except Lukowsky, J., who dissents.

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SUPREME COURT OF KENTUCKY

COMMONWEALTH OF KENTUCKY

Respondent

v.

DAVID RAWLINGS

Movant

ON REVIEW FROM COURT OF APPEALS
CA-1185-MR
(Warren Circuit Court No. 17134)

DISSENTING OPINION BY JUSTICE LUKOWSKY

The majority opinion holds that the search of Cox's purse did not violate "Rawlings' legimiate or reasonable expectation of freedom from governmental intrustion" under the Fourth Amendment even though the items seized belonged to Rawlings and had been placed in Cox's purse with her consent for safekeeping.[1] I am compelled to dissent for two reasons.

I

The searches and seizures which occurred were the fruits of unlawful arrests and should be suppressed. Wong Sun v. United States, 371 U.S. 481, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). After lawfully entering the premises to arrest Marquees the police officers decided that they had probable cause to obtain a warrant to search the premises for marijuana. While some of the police officers went to obtain the search warrant, the remaining police officers would not allow those present to leave the room or the premises unless they would submit to a search. This constituted an ar-

[1] Although not articulated in the majority opinion it must be assumed from its tenor that if Cox had been challenging the validity of the search instead of Rawlings the court would have held the search to the unreasonable under the Fourth Amendment and ordered the evidence suppressed. United States v. Micheli, C.A. 1st, 487 F. 2d 429 (1973); United States v. Hooper, E.D. Tenn., 320 F. Supp. 507 (1969); Parker v. State, 177 Tenn. 380, 150 S.W. 2d 725 (1941).

rest because it significantly deprived those individuals of their freedom of action. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). It was not an investigatory stop but an arrest because the detention here went well beyond the bounds of permissible investigatory stops. See, e.g., United States v. McCaleb, 6th C.A., 552 F .2d 717, 720 (1977); Manning v. Jarrigan, 6th C.A., 501 F .2d 408, 410-411 (1974).

The arrest of Rawlings and the other people present at 1264 Adams Street was unlawful because no misdemeanor had been committed in the presence of the police officers.[2] KRS 431.005. The facts that the police officers smelled the odor of burnt marijuana and inadvertently discovered a few marijuana seeds in "plain view" in Marquess' room created probable cause for the police officers to obtain a search warrant for the premises, but did not establish that a misdemeanor was being committed in their presence by any of the individuals on the premises.[3] See, e.g., Marsh v. Commonwealth, 255 Ky. 484, 74 S.W. 2d 943 (1934). The odor of burnt marijuana is merely evidence that marijuana has been smoked on the premises at sometime in the past.[4] It does not establish that marijuana is present on the premises at the time the odor is detected. Only the odor of either unburned marijuana or burning marijuana would indicate the actual presence of marijuana on the premises. The presence of the seeds in Marquess' room did not create probable cause to believe that any of the individuals in the living room possessed marijuana even with the presence of the odor of burnt marijuana. See, e.g., People v. Hilker, 403 Mich. 312, 269 N.W. 2d 159 (1978); State v. Schoendaller, Mont., 578 P. 2d 730, (1978). The possession of the odor of burnt marijuana is not an offense in this Commonwealth hence no misdemeanor was committed in the presence of the police officers.

[2] The first offense of possession of marijuana for sale is a misdemeanor. KRS 218A.990 (4). There is nothing in the record to indicate that any of the individuals present had been previously convicted of this offense so as to provide the police officers with reasonable grounds to believe a felony had been committed by anyone.

[3] The possesion of marijuana for personal use is a misdemeanor. KRS 218A. 990(7).

[4] The Commonwealth's evidence established that it had been at least twenty-four hours since marijuana had been smoked on the premises.

But for the unlawful detention of Rawlings and the others present in the house, the police would not have discovered any evidence against Rawlings. All evidence discovered was a result of this unlawful detention and should be suppressed as "fruit of the poisonous tree." Wong Sun v. United States, supra; Brown v. Illinois, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975).

II

Even if Rawlings and the others present had not been arrested by the police when they detained them for forty-five minutes, the search of Cox's purse was unlawful because the search was beyond the perimeter of the search warrant and consequently unreasonable under the Fourth Amendment.[5] The real issue here is whether Rawlings should be permitted to raise the clear violation of Cox's Fourth Amendment rights as a violation of his own on the basis that he owned the property seized and the offense charged is the possession of that property.[6]

The majority opinion concludes "that Rawlings *probably* does not have standing to raise the issue . . ." of the illegality of the search of Cox's purse. (Emphasis added). This conclusion is apparently based on Rakas v. Illinois ___U.S.___, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978).

Rakas is substantially different from the instant case. It involved a non-possessory offense and the articles seized were not owned by or in the possession of the defendants. Id. ___U.S. at___n.1, 99 S. Ct. at 423 n.1, 58 L. Ed. 2d at 393 n.1. Rakas reformulated the test for standing to contest the legality of a search. It held that standing and the substantive Fourth Amendment question of whether a reasonable expectation of privacy exists are the same. That is to say, if there is standing there is a legitimate expectation of privacy and vice versa. However, it left undisturbed the automatic standing rule articulated in Jones v. United

[5] Supra note 1.

[6] Because of the limitations imposed on federal review of Fourth Amendment issues by Stone v. Powell, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976), I am disturbed that my colleagues are willing to affirm a conviction which rests upon allegedly illegally obtained evidence when they confess in the majority opinion that they find the concepts of law involved to be "totally incomprehensible." Collins v. Commonwealth, Ky., 574 S.W. 2d 296, 298 n.1 (1978) Lukowsky, J., dissenting).

States, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960), for possessory offenses. I do not read Simmons v. United States, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968), as undermining this rule but as a reaffirmation of it.[7] Rakas v. Illinois,___U.S.___,___ n.6, 99 S. Ct. 421, 439 n.6, 58 L. Ed. 2d 387, 412 n.6 (1978) (White, J., dissenting); See Brown v. United States, 411 U.S. 223, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973).

Rawlings is charged with a possessory offense and the Commonwealth should not be heard to say that his possessoin of these drugs is sufficient to support his conviction but insufficient to support a reasonable expectation of privacy when they are concealed in the purse of a companion. He was entitled to expect that governmental officials would intrude into the purse only with consent or by complying with the Fourth Amendment. Rakas v. Illinois,___U.S.___,___, 99 S. Ct. 421, 441, 58 L. Ed. 2d 387, 414 (1978) (White, J., dissenting). Jones v. United States, supra, recognizes his standing to raise the illegality of the search and seizure of the evidence from Cox's purse. Rakas v. Illinois,___U.S.___,___n.4, 99 S. Ct. 421, 426 n.4, 58 L. Ed. 2d 387, 396 n.4 (1978). Because the search of Cox's purse was an unreasonable search and seizure it should be suppressed. Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

Further, the search of Rawlings' person was unlawful because it was not incident to a valid arrest. The "second" arrest upon which the search was based was itself unlawful because it was based upon the fruits of the illegal search for and seizure of the drugs in Cox's purse.

I would reverse the judgment and remand the case to the circuit court for a new trial with directions to suppress the evidence discovered by the unlawful searches.

[7] Simmons v. United States holds that when possession of the seized evidence is in itself an essential element of the offense with which the defendant is charged the prosecution is precluded from denying that the defendant has the requisite possessory interest to challenge the admission of the evidence.

SUPREME COURT OF KENTUCKY
78-SC-324-DG
May 1, 1979

COMMONWEATH OF KENTUCKY

vs.

DAVID RAWLINGS

WARREN CIRCUIT COURT
17137

The Court being sufficiently advised, and this Court's opinion having been rendered May 1, 1979, it is therefore considered that the decision of the Court of Appeals is affirmed, which is ordered to be certified to said court.

MARTHA LAYNE COLLINS, CLERK

Issued May 22, 1979

In The Supreme Court of the United States

No. 79-5146

DAVID RAWLINGS,

Petitioner,

v.

Kentucky

ON PETITION FOR WRIT OF CERTIORARI TO the Supreme Court of the Commonwealth of Kentucky.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is set for oral argument in tandem with No. 79-244, *United States* v. *Salvucci.*

December 10, 1979